# CERTIFICATE

## Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 110

JOHN P. DONNELLEY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED AUGUST 30, 1928

(32,149)

(32,149)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1926**

## No. 582

JOHN P. DONNELLEY

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 24, 1926

tions of the National Prohibition Act by the said James A. Curran, did wilfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act."

The information contained three other counts of like import, but as to the latter the jury returned a verdict of not guilty. A verdict of guilty was returned as to the first count only and the judgment on the verdict is now before the above entitled court for review on writ of error.

Section 2 of Title II of the National Prohibition Act provides:

"The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; * * *."

Section 29 of the same Act and Title provides:

"Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years."

[fol. 3] QUESTION CERTIFIED

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Does the neglect or failure of the Commissioner of Internal Revenue, his assistants, agents or inspectors to report violations of the National Prohibition Act, coming to their knowledge, to the United States Attorney for the district in which committed, as provided in section 2 of Title II, and as charged in the information, constitute a violation of any provision of Title II, within the true intent and meaning of section 29 of said Act and Title?

Wm. B. Gilbert, Wm. H. Hunt, Frank H. Rudkin,
United States Circuit Judges.

(Endorsed:) Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code. Filed July 14, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

A true copy.
July 14, 1926.

Attest:

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. (Seal United States Circuit Court of Appeals for the Ninth Circuit.)

Endorsed on cover: File No. 32,149. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 582. John P. Donnelley vs. The United States of America. (Certificate.) Filed August 23, 1926. File No. 32,149.

# (32,149)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1927

# No. 110

JOHN P. DONNELLEY

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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## NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. HOYT, NORCROSS, CHENEY & HOYT, Reno, Nevada,
For the Plaintiff in Error.

Hon. GEORGE SPRINGMEYER, United States Attorney for the District of Nevada, Reno, Nevada, Hon. CHARLES A. CANTWELL, Assistant U. S. Attorney for the District of Nevada, Reno, Nevada, and Hon. GEORGE A. WHITELEY, Assistant U. S. Attorney for the District of Nevada, Carson City, Nevada,
For the Defendant in Error. [1*]

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In the District Court of the United States of America in and for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN P. DONNELLEY,
Defendant.

## INFORMATION FOR VIOLATION OF THE NATIONAL PROHIBITION ACT.

United States of America,
District of Nevada,—ss.

BE IT REMEMBERED, That George Spring-

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*Page-number appearing at foot of page of original certified Transcript of Record.

meyer, Esq., the Attorney of the United States for the District of Nevada, who prosecutes in behalf and with the authority of the United States, and with leave of Court first had and obtained, comes here in person into court at this October, 1924, term thereof, and for the United States gives the Court to understand and be informed that one John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 2d day of September, 1922, and before the filing of this information, in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors containing over one-half of [2] one per cent of alcohol by volume, fit for use for beverage purposes, on or about said September 2, 1922, in an automobile truck from those certain premises known and described as "James McKay's Place," situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the City of Reno, Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley then and there having knowl-

edge, as aforesaid, of the said violations of the National Prohibition Act by the said James A. Curran, did wilfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act.

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT.

That the said John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 18th day of September, 1922, and before the filing of this information in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. [3] Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about the said 18th

day of September, 1922, in an automobile truck from those certain premises known and described as "James McKay's Place," situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the "Rex Road House," situate in Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley, then and there having knowledge, as aforesaid, of the said violations of the National Prohibition Act by the said James A. Curran, did wilfully, unlawfully and knowingly, and in violation of the National Prohibition, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act.

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT.

That the said John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 18th day of September, 1922, and before the filing of this information in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition [4] Director for the District of Nevada, appointed and

acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about the said 18th day of September, 1922, in an automobile truck from those certain premises known and described as "James McKay's Place," situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the "Rex Road House," situate in Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley, did then and there wilfully, unlawfully and knowingly, and in violation of the National Prohibition Act fail, neglect and refuse to investigate the said violations of the said National Prohibition Act by the said James A. Curran, after the same were then and there reported to him, the said defendant, John P. Donnelley, by Richard Heap, Mrs. P. Nash and Jonathan Payne, and he, the said defendant, John P. Donnelley, did then and there wilfully, unlawfully and knowingly fail, neglect and refuse to arrest or cause the arrest of the said James A. Curran for the said violations of the said National Prohibition Act.

CONTRARY to the form of the statute in such

case made and provided, and against the peace and dignity of the United States. [5]

FOURTH COUNT.

That the said John P. Donnelley, hereinafter called the defendant, heretofore, to wit, on or about the 31st day of March, 1923, and before the filing of this information, in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one John Doe whose true name is unknown, in the unlawful possession by the said John Doe, for beverage purposes of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about said March 31, 1923, in a garage between Quinn's Road House and the Rex Road House on the South Virginia Road, Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley, did then and there, wilfully, unlawfully and knowingly neglect to perform a duty enjoined upon him by law, to wit, the duty of investigating the said unlawful possession of said intoxicating liquor by the said John Doe, and of ascertaining the identity of and of causing the arrest of the said John Doe for the said offense, the facts concerning which were then and there duly reported to the said defendant

John P. Donnelley by Louis A. Spellier, Collector of Internal Revenue for the District of Nevada.

CONTRARY to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

GEORGE SPRINGMEYER,
United States Attorney. [6]

United States of America,
District of Nevada,—ss.

I, George Springmeyer, United States Attorney for the District of Nevada, being sworn, do say that the foregoing information is true as I verily believe.

GEORGE SPRINGMEYER.

Subscribed and sworn to before me this 16th day of January, 1925.

[Seal] E. O. PATTERSON,
Clerk.

[Endorsed]: Filed Jany. 16, 1925. [7]

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[Title of Court and Cause.]

VERDICT.

We, the Jury in the above-entitled case, find the defendant, John P. Donnelley, —— guilty as charged in the first count of the information; not guilty as charged in the second count; not guilty as charged in the third count, and not guilty as charged in the fourth count.

Dated this 19th day of November, 1925.

W. H. WENNHOLD,
Foreman.

[Endorsed]: Filed this 19th day of November, 1925. [8]

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[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

COMES NOW the above-named defendant, John P. Donnelley, and moves the Court for an order arresting judgment in the above-entitled cause upon the following grounds:

I.

That the Court has no jurisdiction to enter judgment upon the information.

II.

That the facts stated in the information do not constitute a public offense.

Dated, this 28th day of November, 1925.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Defendant.

[Endorsed]: Filed this 28th day of November, 1925. [13]

In the District Court of the United States for the District of Nevada.

October Term, 1925.

Honorable E. S. FARRINGTON, Judge.

No. 6555.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN P. DONNELLEY,

Defendant.

## JUDGMENT.

Violation National Prohibition Act.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

An information has been filed against you, John P. Donnelley, charging you with having violated the National Prohibition Act by, while acting as Federal Prohibition Director for the District of Nevada, wilfully, unlawfully and knowingly failing to report knowledge of violations of the National Prohibition Act to the United States Attorney for the District of Nevada; and, while acting as such Federal Prohibition Director for the District of Nevada, wilfully, unlawfully and knowingly failing, neglecting and refusing to investigate the said violations of the National Prohibition Act; said crimes having been committed on the 2d day of September,

1922, the 18th day of September, 1922, and the 31st day of March, 1923, in Washoe County, State and District of Nevada, and within the jurisdiction of this Court. You were duly arraigned upon that information, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the first count of the information and not guilty as charged in the second, third and fourth counts. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not. [14]

In consideration of the law and the premises, IT IS HEREBY ORDERED AND ADJUDGED that you pay to the United States a fine in the sum of Five Hundred ($500.00) Dollars, and that you stand committed to the custody of the Marshal until the fine is paid, or in default of the payment of said fine that you be imprisoned in the county jail of Washoe County, Nevada, until the fine is paid or until you be otherwise discharged in due course of law.

Dated and entered Dec. 10, 1925.

Attest: E. O. PATTERSON,
Clerk.
By O. E. Benham,
Deputy. [15]

[Title of Court and Cause.]

## ASSIGNMENT OF ERRORS OF THE DEFENDANT, JOHN P. DONNELLEY.

John P. Donnelley, the defendant in the above-entitled cause, by and through his attorneys, Messrs. Hoyt, Norcross, Cheney & Hoyt, in connection with his petition for writ of error, makes and offers the following assignment of errors, which he alleges occurred upon the trial of said cause:

1. That the verdict is contrary to law.

2. That the verdict is not supported by the evidence in the decree required by law.

3. That the first count of the information fails to allege, and does not set forth, facts sufficient to constitute a public offense, in violation of the National Prohibition Act, or any section or sections thereof, or any law of the United States.

4. That the Court erred in overruling defendant's motion for directed verdicts of not guilty made at the conclusion of the evidence offered upon the part of plaintiff.

5. That the Court erred in overruling defendant's motions for directed verdicts of not guilty made at the conclusion of the case and before final submission to the jury. [34]

6. That the Court erred in overruling the defendant's motion in arrest of judgment, in this, to wit:

> That the first count in the information, being the count upon which the verdict of guilty was found, fails to allege, and does not set forth,

facts sufficient to constitute a public offense, in violation of the National Prohibition Act, or any section or sections thereof, or any law of the United States.

7. That the Court erred in refusing to give defendant's requested instruction No. 1, reading as follows:

"The jury is instructed that the statute requiring reports to be made by the Federal Prohibition Director for the State of Nevada to the United States Attorney for this district reads: 'The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders.'

You are further instructed that the defendant was an assistant or agent of the Commissioner of Internal Revenue and, as such, it was his duty to report to the United States Attorney for the District of Nevada all offenses against the National Prohibition Act committed within such district where the offender or offenders are known to such Federal Prohibition Director."

8. That the Court erred in refusing to give defendant's requested instruction No. 2, reading as follows:

"The jury is instructed that the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an of-

fense has been committed [35] against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense."

9. That the Court erred in refusing to give defendant's requested instruction No. 3, reading as follows:

"The jury is instructed that the defendant, as Prohibition Director, was not required to report to the United States Attorney a violation of the Federal Prohibition Act unless he had knowledge both of the violation of the act and the person or persons guilty of such violation; that the knowledge upon his part making it obligatory for him to so report consists of sufficient evidence in his possession to reasonably justify prosecution."

10. That the Court erred in refusing to give defendant's requested instruction No. 4, reading as follows:

"The jury is instructed that unless you believe from the evidence, beyond a reasonable doubt, that on or about the 2d day of September, 1922, one James A. Curran was knowingly in possession of and transporting intoxicating liquor containing over one-half of one per cent of alcohol by volume, then your verdict should be for the defendant on the first count of the information for it is not a violation of the National Prohibition Act to have possession of and transport such intoxicating liquor with-

out knowing that the thing possessed and transported is such intoxicating liquor."

11. That the Court erred in refusing to give defendant's requested instruction No. 7, reading as follows:

"The jury is instructed that an arrest cannot lawfully be made by a Federal Prohibition Agent except in the case of an offense committed in his presence. Where the offense is not [36] committed in the presence of such officer the arrest to be lawful must be made upon warrant."

12. That the Court erred in refusing to give defendant's requested instruction No. 8, reading as follows:

"The jury is instructed that a Federal Prohibition Agent may not lawfully search a vehicle on or proceeding on a public highway or open packages contained therein or thereon without a search-warrant unless there is known to such officer probable cause for believing that such vehicle is carrying contraband or illegal merchandise."

13. That the Court erred in instructing the jury in the following particulars:

(a) In instructing the jury as follows:

"It was therefore his duty to investigate and report violations of the National Prohibition Act to the United States District Attorney. The violation which is alleged in the information, in all four counts, is a violation of section

3, Title II of the National Prohibition Act. That Section reads as follows:

'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect * * * transport or possess any intoxicating liquor, except as authorized in this act.'

There is nothing in the act which authorizes one to transport or possess intoxicating liquor on the Virginia highway south of Reno."

(b) In instructing the jury as follows:

"Section 33 is another section which has some bearing on this same situation:

'After February 1, 1920, the possession of liquors [37] by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title; * * * and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used.'

So if one is in the possession of intoxicating liquor—and one who is transporting intoxicating liquor must necessarily be in possession of it—the presumption is that the possession is illegal, that it is for the purpose of violating the law, and the burden is on him to show the contrary."

(c) In instructing the jury as follows:

"It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violated it. That frequently happens. Men are murdered and we do not know who the murderer is; there is a crime nevertheless. Whiskey may be transported on a highway; you may find it in your automobile, but may not know who put it there; there is a violation of the law, but you don't know who the guilty party is.

In this case Curran was transporting whiskey, and he didn't know it was whiskey, the jury might say he didn't intend to violate the law, therefore he cannot be convicted, nevertheless there was a violation of the law in that he had possession and was transporting intoxicating liquor along a public highway."

(d) In instructing the jury as follows:

"In determining whether Curran knew anything about this, you [38] are not bound to accept his statement as conclusive; you are to view the circumstances; actions often speak very much louder than words. You will consider what he said at that time and place; you will consider the place itself; you will consider his story, and compare it with the story of other witnesses, Mrs. Menke for instance; you will consider his denial, consider all the facts connected with it, and determine whether he knew he had whiskey or not, whether he could transport this liquor, and whether it could be unloaded, and he could unload it from a broken

down truck and put it into another truck without some suspicion as to what he had. It is not necessary that he should be fully informed that this whiskey or beer, or whatever it was, contained one-half of one per cent or more of alcohol, because if it was beer it is prohibited by the statute."

(e) In instructing the jury as follows:

"So if he (Curran) knew that he had wine, knew that he had whiskey, knew that he had beer, he must be presumed to know the law. The statute prohibits the possession of beer."

(f) In instructing the jury as follows:

"Section 26 of Title II of the Act provides:

'When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle or team or automobile, boat, [39] air or water craft, or any other conveyance, and shall arrest any person in charge thereof.'"

(g) In instructing the jury as follows:

"The statute is the law as it is written, and when it says that an officer must report violations of the law, it means just what it says,

and it cannot be construed to mean that he need not report violations unless he has knowledge both of the violation and the person or persons guilty of such a violation. The words undoubtedly were used advisedly by Congress when it approved that statute, and put in on the books."

(h) In instructing the jury as follows:

"The first count is that on or about the 2d day of September, 1922, and before the filing of this Information, Captain Donnelley was the Federal Prohibition Director for the State of Nevada, and that he then knew of the violation of the Prohibition Act by James A. Curran, who was at that time transporting and in possession of intoxicating liquor in an automobile on the South Virginia Road, about two miles south of Reno, and that he then and there had knowledge of the possession and transportation of the intoxicating liquor, and that he then and there failed to report the knowledge of said violation of the law to the United States District Attorney."

14. That the Court erred in failing to instruct the jury that the information must be proved, as laid, and that, in order to convict, it would be necessary for the Government to prove, as alleged in the information, that the defendant then and there had actual knowledge of violations of the National Prohibition Act by one James A. Curran, and that, then and there [40] having knowledge, as aforesaid, of said violations of the Na-

tional Prohibition Act by said James A. Curran, he did wilfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada.

15. That the Court erred in each and every particular of its general charge in this, to wit, that the Court should have withdrawn the issues from the jury and directed a verdict for the defendant.

WHEREFORE, the defendant prays that the judgment of said District Court may be reversed.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Defendant.

[Endorsed]: Filed this 10th day of Dec., 1925. [41]

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[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that this cause was duly tried before the Honorable E. S. Farrington, United States District Judge, and a jury duly impaneled and sworn.

BE IT FURTHER REMEMBERED, that testimony was received as follows: That the defendant was, at the times alleged in the information, Federal Prohibition Director for the State of Nevada; that about nine o'clock in the forenoon of September 2d, 1922, someone in the office of de-

fendant received a telephone call stating that there was a broken down truck on the main highway leading south from Reno, and about two miles therefrom, which, in the belief of the informant, contained a load of intoxicating liquor; that the defendant immediately sent five prohibition agents, Officers Nash, Toohey, Brown, DuBois and Scott, to investigate; that the said officers found one James A. Curran, then and now a drayman engaged in the business of drayage for hire in the city of Reno, at the place designated, about midway between the McKay residence and the Quinn and Rex [49] roadhouse; that prohibition agents by reason of reports received, possibly before September 2, 1922, had been watching Curran for some time; that Curran's truck was stalled on the highway, and Curran engaged in making some repairs to enable him to proceed towards Reno; upon the truck was found ten barrels, without any marks or inscriptions indicating the contents; that, in reply to interrogatories, Curran informed the officers that he knew nothing of the contents of the barrels; that he had responded to a telephone call and received the load from another disabled truck, the driver of which he did not know, but who had told him the load was from Tonopah and for him to haul it on his, Curran's truck to the latter's warehouse, where the driver of the disabled truck would later call for it; that a search-warrant had not been applied for or issued; that a United States Commissioner was then residing at Reno; that one of the officers broke open the

head of one of the barrels and removed therefrom three bottles having neither labels nor marks thereon; that one of the bottles was opened and its contents tasted by two or more of the officers; that Officer Scott, a witness for the plaintiff, testified that he was familiar with and could determine by the taste beer and near beer and would say it was beer and contained more than one-half of one per cent alcohol; that Officer Dubois, also a witness for the plaintiff, testified he could not tell the alcoholic content by mere tasting; that three of the officers then proceeded to Reno, taking the other two bottles for analysis; that the analysis was taken and showed an alcoholic content in excess of four per cent; that, upon completing the repairs to Curran's truck, it was driven by Curran, in company with two of the officers, to the City Hall of Reno, Nevada, where, after receiving the report of the analysis, the ten barrels of beer were [50] unloaded from the truck and placed in a Government vault, where the same were marked and labeled by one of the officers; that the defendant appeared at the City Hall shortly after the arrival of the truck and, after a conversation with Curran and with one or more of the officers, gave directions permitting Curran to depart with his truck; that Officer Nash, a witness for the plaintiff, testified that he asked the defendant if he had released Curran, and that defendant replied that there was no case against him, that Curran had told him he did not know what was in the barrels; that he, Nash, then took

the license number of Curran's truck and gave him his business card and said, "You know where my stand is"; Officer Dubois testified that he asked the defendant at the City Hall what he intended to do, and defendant replied that he would let him, Curran, go and let him take his truck, that we could get him at any time, and that he would take the matter up with Mr. Springmeyer. Mrs. Menke, a witness for the plaintiff, testified that she resided on the Reno-Carson highway about a fourth of a mile north of the McKay place, and on the opposite side of the highway; that, in the morning before ten o'clock A. M. of September 2, 1922, she had seen Curran drive his truck past her place, and shortly thereafter had seen him drive his truck out of the McKay place on to the highway, then turn north and pass her place going towards Reno; that thereafter, on the same morning, she had again seen him pass her place with his truck, going south, and shortly thereafter again saw him drive his truck out from the McKay place on to the highway, and that the truck had stalled just in front of her place and was there seized by prohibition agents; that the McKay place consisted of a residence, to the rear of [51] which was a garage; that a gate opened from the highway into a driveway leading to the garage; that about a hundred feet south of the driveway was a road connecting with the highway, and leading to a ranch to the west, which road formed the south boundary of the McKay property, and from which there was an entrance to the

rear of the McKay residence. Prohibition agents and the defendant testified that all field officers under defendant had general instructions to investigate and report to him violations of the National Prohibition Act; that the defendant did not make any director's case report or other written report relative to the Curran beer seizure to the United States Attorney; that a monthly report of the defendant, as Director of Prohibition, for the month of September, 1922, made to the Commissioner of Prohibition at Washington, and designed to show, among other things, a list of liquors seized, did not contain a reference to the beer seized from the Curran truck; that the beer seized from the Curran truck was destroyed by order of the United States District Court, made on March 5, 1923, the order containing the following descriptive language: "No case—ten barrels of beer."

That, in addition to the foregoing, testimony on behalf of plaintiff was given as follows: The witness Officer Nash testified that following the beer seizure he asked the defendant if he should make a case report, to which the defendant replied "No"; that George Springmeyer testified that he was United States Attorney for Nevada; that defendant had made no report to him, either oral or written, respecting the Curran matter and beer seizure; that he was not in his office on September 2d, 1922, after ten-thirty of the forenoon until late in the evening of that [52] day; that after ten-thirty he was out of his office, and might have been at his father's ranch in Carson Valley, or at

Lake Tahoe, or playing golf; that he never heard of the beer seizure from the Curran truck until March, 1923, when it was being destroyed by order of Court; that he did not see any newspaper account of this seizure.

The defendant, as a witness in his own behalf, testified that about twelve o'clock noon of the day of the seizure of the beer from the Curran truck, and prior to the release of Curran, he went to the office of United States Attorney Springmeyer and informed him of the seizure, and that he, Mr. Springmeyer, agreed with him in respect to the release of Curran; that an account of the seizure was published in the "Reno Evening Gazette" of September 2d, 1922; that the reason he did not make a director's case report to the United States Attorney was, "We didn't have a case; if we got evidence that Mr. Curran did know, why, we would complete our case and make a report"; that it was his custom not to make such a report where, in his judgment, there was not sufficient evidence, the case being considered under investigation until it was built up and completed; that the practice in the office was for the assistant director to prepare reports when ready for the director's signature; that the number of director's case reports made by defendant to the United States Attorney during the term he was Director—about two and a half years—was approximately five hundred; that, in connection with the cross-examination of defendant, plaintiff introduced in evidence a director's case report showing a seizure of a still

made upon search-warrant, where no one was found in possession and no arrest made, and containing a reference to a person named therein as being suspected of operating a still in the vicinity [53] and further investigation would be made; also, plaintiff introduced in evidence a director's case report showing a seizure, under search-warrant, of intoxicating liquor from the American Express Company, at Reno, addressed to Frank R. Mason, and that Eichelberger, manager, was requested to notify the office if Mason called for the package; also, plaintiff introduced in evidence a director's case report showing the seizure of a pint of whiskey and a Ford car from one Larkin and one Maupin, at Fallon, Nevada, Maupin being in the act of drinking out of a bottle, and no arrest made, together with correspondence between defendant and the United States Attorney's office, mutually agreeing that the case did not warrant prosecution; also, plaintiff introduced in evidence a director's case report showing the seizure of liquor at Reno, Nevada, from a room under the premises on 18 East Commercial Row and the detention of one George Billenman, the report also showing that Agent Scott had taken the matter up orally with the United States Attorney's office, and that Scott was informed by said office that there was no sufficient case; that Billenman was then released. The United States Attorney reported that no criminal proceedings would be instituted because of a defective search-warrant.

BE IT FURTHER REMEMBERED, that testimony was introduced as follows: Richard Heap, upon the part of the plaintiff, testified that on the 18th of September, 1922, he was a deputy sheriff of Washoe County, Nevada, serving in the capacity of a traffic officer on the Virginia highway leading south from Reno; that about eight o'clock of the evening of that day, while [54] riding his motorcycle on the highway north towards Reno, and while at a point about one hundred yards south of the McKay residence, he observed an autotruck approaching, driving south; that at a point opposite the McKay residence the driver of the truck extinguished the lights of the truck and turned into the road immediately to the south of the McKay residence; that he recognized the driver of the truck to be James Curran, and the truck to be the one used by him in his transfer business in Reno; that on this occasion the bed of the truck had boards on the sides, extending the same upwards about three feet from the manner in which the truck appeared when in transfer use in the streets of Reno; that the witness then immediately went to the residence of Percival Nash on the highway at South Virginia Street; that Mrs. Nash placed a telephone call for Jonathan Payne, Assistant Prohibition Director, at the latter's residence, and that he then talked with said Payne on the telephone; that the witness then returned to a point on the Virginia highway north of the McKay place, and saw Curran apparently drive out of the lane immediately south of the McKay

place on to the highway with his truck lights extinguished, and observed him then drive towards Reno; that he rode his motorcycle close to the rear of the truck and saw that the truck was loaded with barrels, and that a canvas cover was over the top of the barrels; that he followed the truck with his motorcycle to a point opposite the Rex roadhouse, adjoining the city limits, at which point the truck was turned off the highway to the west and to the side and rear of an auto service station on the highway and on the opposite side of the street from the Rex roadhouse; that he observed Curran leave the truck, cross the street and enter the Rex roadhouse; that it was then about ten [55] o'clock at night, and, as he was an hour over his working time, he proceeded on to his home; that at that time the state prohibition law was in force, of which he had knowledge; that the next day he went to defendant's office and asked defendant what he was going to do about the case, and that defendant said to him that he could not do anything about it or was not going to do anything about it until they saw what they were going to do with the truck-load of beer which had been seized previously, because he did not know whether he could make a case out of it or not; that he did not recall anything else that was said in that respect; that he just asked defendant what he had done in regard to the truck-load of booze he had reported, that is, the truck he had reported the night before; that defendant said he could not do anything about the matter because he did not know

whether he could make a case out of it until he saw what had become of the other truck-load of beer that had been seized; that he did not know what alcoholic content it contained.

Mrs. Percival Nash testified, for the plaintiff, that on the evening of September 18th Mr. Heap had called at her residence that all the prohibition agents were out of town, and that she phoned to Assistant Director Johnathan Payne, and that Mr. Heap talked to him on the phone.

George Springmeyer testified for the plaintiff that he was United States District Attorney for the State of Nevada; that defendant had appeared before a grand jury prior to the filing of the information and had stated or testified, in reply to a question propounded to him, that "Mr. Payne, his Assistant Director of Prohibition, had reported the matter to him the night of September 18, 1922, and that he had not done anything about it and that it was no business of mine whether it was a part of [56] the McKay supply of liquor or not; that he would run his office without any interference by me." Upon cross-examination the witness testified that the defendant said to the grand jury: "Mr. Payne had reported to him on the night of September 18, 1922, that Curran had a truck-load of intoxicating liquor on the Virginia highway that night, but he, Mr. Donnelly, had not done anything about it; that it was none of my business whether it was a part of the McKay supply of liquor or not, and that he would run his own

office." The witness further testified that his relations with the defendant were unfriendly.

The defendant testified that he did not recall a conversation with Mr. Heap, but that, in any event, he made no statement to him to the effect that he did not know the alcoholic content of the beer seized from the Curran truck on September 2d; that many reports came to the office daily with reference to violations or suspected violations of the Prohibition Law; that it was the practice of the office to make a memorandum at the time of all such reports, and at nine o'clock of the forenoon of each day the prohibition agents would meet at the office, when reported violations were called to their attention; that he had appeared as a witness before a grand jury prior to the filing of the information upon which he was upon trial and was sworn as a witness; that he did not testify before said grand jury that Mr. Payne had made any report to him on the night of September 18, 1922, relative to the Curran matter testified to by Richard Heap, and that he did not testify that Mr. Payne had reported to him at that time that Curran had a truck-load of intoxicating liquor on the Virginia highway that night, and that he did not testify that he, Donnelly, had not done anything about it, and that he did not testify that it was none of the business of Mr. Springmeyer [57] whether it was a part of the McKay supply of liquor or not.

BE IT FURTHER REMEMBERED, that Louis A. Spellier, Collector of Internal Revenue, District

of Nevada, on behalf of the plaintiff, testified as follows: That on or about March 31, 1923, he reported to the defendant that certain parties had informed him, Spellier, that a quantity of bonded liquor and beer had been stored in a garage or outbuilding at the rear of the Rex roadhouse, on the South Virginia Road; that the party who conveyed the information to him lived in that vicinity, and had reported that this garage was constantly under guard by a Chinese or Japanese, and that he, Spellier, at that time drew a sketch, as near as he could recall, of the premises.

On cross-examination Spellier testified that he did not tell the defendant who the party informing was; that the information given him was given by George Springmeyer, and that he, Spellier, had no direct knowledge of it at all. On redirect examination Spellier testified that the report was made to the defendant at his private office, no one else being present; that he could not give defendant's exact words, but that the defendant said the matter would either be looked into or would be taken up at once, he didn't recall which.

That the defendant, testifying upon this matter, said he had no personal recollection of the report made to him by Spellier, but had no doubt of the correctness of Spellier's testimony.

That, while George Springmeyer, United States Attorney, was testifying, he was asked the following question:

> "As to the offense of March 31, 1923, reported or testified to by Mr. Spellier as having

been reported to Mr. Donnelley, do you recall whether Mr. Donnelley made any statement before the Federal Grand Jury relative to [58] that matter?"

to which he gave the following answer:

"He said that Mr. Spellier had reported it to him, and when he was asked how it was that the liquor was moved on the night of the very day that it was reported to him by Mr. Spellier, that it was none of my affair, or none of my business, as to whether it was a part of the McKay supply of liquor or not, and he said he had not made any investigation of the matter whatsoever."

The defendant testified that he did not state or testify before the grand jury that Mr. Spellier had reported the matter of March 31st, 1923, to him; that he did not testify that it was none of his, Springmeyer's, affair as to whether it was a part of the McKay supply of liquor or not; that he did not testify that he had not made any investigation of the matter whatever.

The witness Springmeyer and the defendant each testified that no report, either oral or written, had been at any time made to the office of the United States Attorney by the defendant relative to either the matter reported by Heap or the matter reported by Spellier. [59]

BE IT FURTHER REMEMBERED, that upon the conclusion of the introduction of evidence upon the part of the plaintiff, and again upon the conclusion of the introduction of evidence upon the entire

case, but not until after the completion of the opening argument of counsel for the plaintiff, defendant moved the Court for a directed verdict of not guilty in respect to the first count of the information and in respect to the other counts thereof, upon the ground that the evidence was insufficient to support a verdict of guilty; that said motions, and each of them, were denied, to which the defendant took his exceptions.

BE IT FURTHER REMEMBERED, that the defendant requested the Court to give certain requested instructions, which were refused by the Court, said requested instructions being as follows:

No. 1.

"The jury is instructed that the statute requiring reports to be made by the Federal Prohibition Director for the State of Nevada to the United States Attorney for this district reads: 'The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders.'

You are further instructed that the defendant was an [60] assistant or agent of the Commissioner of Internal Revenue and, as such, it was his duty to report to the United States Attorney for the District of Nevada all offenses against the National Prohibition Act committed within such district where the offender or offenders are known to such Federal Prohibition Director."

No. 2.

"The jury is instructed that the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an offense has been committed against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense."

No. 3.

"The jury is instructed that the defendant, as Prohibition Director, was not required to report to the United States Attorney a violation of the Federal Prohibition Act unless he had knowledge both of the violation of the act and the person or persons guilty of such violation; that the knowledge upon his part making it obligatory for him to so report consists of sufficient evidence in his possession to reasonably justify prosecution."

No. 4.

"The jury is instructed that unless you believe from the evidence, beyond a reasonable doubt, that on or about the 2d day of September, 1922, one James A. Curran was knowingly in possession of and transporting intoxicating liquor containing over one-half of one per cent of alcohol by volume, then your verdict should be for the defendant on the first count of the information for it is not a violation of the National [61] Prohibition Act to have possession of and transport such intoxicating liquor without knowing that the thing possessed and transported is such intoxicating liquor."

No. 7.

"The jury is instructed that an arrest cannot lawfully be made by a Federal Prohibition Agent except in the case of an offense committed in his presence. Where the offense is not committed in the presence of such officer, the arrest to be lawful must be made upon warrant."

No. 8.

"The jury is instructed that a Federal Prohibition Agent may not lawfully search a vehicle on or proceeding on a public highway or open packages contained therein or thereon without a search-warrant unless there is known to such officer probable cause for believing that such vehicle is carrying contraband or illegal merchandise."

BE IT FURTHER REMEMBERED, that the Court instructed the jury as follows:

"The COURT.—I do not suppose any one will dispute the proposition that this has been a very long trial; and while the Court may have manifested some impatience during the progress of the trial as to its length, I think it is proper to say that counsel have a duty to perform to their clients; it was for them to present the issues in this case, and to present the testimony in such a way that the issues might be understood, and that all the facts which were necessary in order to decide those issues should be presented fully and clearly to the Court and to the jury. The case is an important one in many respects: first, on account of the character and position of those who are involved [62] in it; and the issues themselves are decidedly serious;

they are serious to the public; they are serious as affecting the enforcement of law, and the enforcement of law is a great and important business of courts and of juries.

Four charges, those contained in the information, are charges against the defendant of distinct violations of a duty which he owed because of his official position as Prohibition Director for Nevada. That is a matter which you will keep distinct throughout the trial.

The first count is that on or about the 2d day of September, 1922, and before the filing of this information, Captain Donnelley was the Federal Prohibition Director for the State of Nevada, and that he then knew of the violation of the prohibition act by a man named James A. Curran, who was at that time transporting and in possession of intoxicating liquor in an automobile on the South Virginia Road, about two miles south of Reno, and that he then and there had knowledge of the possession and transportation of the intoxicating liquor, and that he then and there failed to report the knowledge of said violation of the law to the United States District Attorney.

The second count is somewhat similar. It alleges that on the 18th day of September, this man Curran was again transporting intoxicating liquor along the Virginia highway; that this fact was subsequently known tc the defendant Donnelley, and that he failed to report that violation to the District Attorney.

The third count deals with the same transaction;

that is, on the 18th day of September, 1922, Curran was then transporting intoxicating liquor, and Captain Donnelley knew of it, and wilfully and knowingly and in violation of the National Prohibition Act, failed, neglected and refused to investigate the [63] violation of the said National Prohibition Act by the said James A. Curran.

The fourth count relates to the 31st day of March, 1923. There the allegation is that the defendant had knowledge of the violation of the National Prohibition Act by one John Doe, whose true name is unknown, in the unlawful possession by the said John Doe of intoxicating liquor containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about that date; and that he failed and refused to investigate the unlawful possession of said liquor, concerning which the facts had been reported to him by Louis A. Spellier.

Section 2, Title 11 of the Prohibition Act relates to the duties of the Prohibition Director, and reads as follows:

> 'The Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of this act to the United States Attorney for the District in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General as in the case of other offenses against the laws of the United States.'

Now, Captain Donnelley was one of the officers upon whom the duty lay under the section which I

have read. It was therefore his duty to investigate and report violations of the National Prohibition Act to the United States District Attorney.

The violation which is alleged in the information, in all four counts, is a violation of section 3, Title 11 of the National Prohibition Act. That section reads as follows:

> 'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect * * * transport or possess any intoxicating liquor, except as authorized in this act.'

There is nothing in the act which authorizes one to transport or possess intoxicating liquor on the Virginia highway south of Reno. [64]

There is another section to which perhaps I had better call your attention, Section 26:

> 'When the commissioner, his assistants, inspectors or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law.'

Section 33 is another section which has some bearing on this same situation:

> 'After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged,

given away, furnished, or otherwise disposed of in violation of the provisions of this title; * * * and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used.'

So if one is in the possession of intoxicating liquor—and one who is transporting liquor must necessarily be in possession of it—the presumption is that the possession is illegal, that it is for the purpose of violating the law, and the burden is on him to show the contrary.

In order to warrant a conviction for the violation of this act, the possession must be a conscious possession. A man cannot slip a bottle of wine or whiskey into your suitcase, and you carry it not knowing it is there, and be guilty. It is a violation of the law to have possession of whiskey, but under our criminal statutes and our criminal practice, there must not only be a criminal act but a criminal intent, and unless a man intends to violate the law he is not guilty of a violation. In all these criminal cases the usual instruction to the jury is that you must first find whether there has been a violation of the law; and if you find there has been a violation, then it is incumbent upon you to determine whether the defendant is the [65] person who violated it.

It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violated it. That frequently happens. Men are murdered, and we

do not know who the murderer is; there is a crime nevertheless. Whiskey may be transported on a highway; you may find it in your automobile, but you may not know who put it there; there is a violation of the law, but you don't know who the guilty party is.

In this case if Curran was transporting whiskey, and he didn't know it was whiskey, the jury might say he didn't intend to violate the law, therefore he cannot be convicted, nevertheless there was a violation of the law in that he had possession and was transporting intoxicating liquor along a public highway.

In determining whether Curran knew anything about this, you are not bound to accept his statement as conclusive you are to view the circumstances; actions often speak very much louder than words. You will consider what he said at that time and place; you will consider the place itself; you will consider his story, and compare it with the story of other witnesses, Mrs. Menke for instance; you will consider his denial, consider all the facts connected with it, and determine whether he knew he had whiskey or not, whether he could transport this liquor, and whether it could be unloaded, and he could unload it from a broken down truck and put it into another truck without some suspicion as to what he had. It is not necessary that he should be fully informed that this whiskey or beer, or whatever it was, contained one-half of one per cent or more of alcohol, because [66] if it was beer it is prohibited by the statute.

Section 1 of the act defines what is meant by intoxicating liquor:

> 'The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes.'

So if he knew that he had wine, knew that he had whiskey, knew that he had beer, he must be presumed to know the law. The statute prohibits the possession of beer.

There are several requested instructions which I will read:

> 'Section 2 of Title 11 of the Act provides:
>
> "The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violation of this act to the United States Attorney for the district in which committed, who is herey charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States."
>
> 'The Prohibition Director is included among the officers who must investigate and report violations of the act to the United States Attorney.'

'Section 26 of Title 11 of the act provides'—I have already read this from the book:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle or team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

'You are instructed that you are the sole judges of the facts. The law you must take from the Court. You are not [67] to consider any matters of sympathy or bias or prejudice. The matter of punishment, if any, is solely within the province of this Court, and it must not be considered by you in deliberating upon your verdict.'

You are instructed that whatever I may have said with reference to the facts in this case, or any intimation I have made during the progress of this trial as to what the evidence shows, is not controlling. You are to apply your own judgment to what has been testified to here, to what has been said by counsel and to what has been said by the Court; and if it is not approved by your judgment as being

correct, you are not at liberty to follow it. You must determine by your judgment what the testimony proves; if you follow what the Court has said or what counsel have said with reference to what the testimony proves and what the facts are, in contradiction to your own judgment, you are not doing your duty. As to the law, you are bound to accept whatever statements the Court makes as to the law. If I make a mistake it is my mistake, a mistake for which I alone am responsible.

There has been a vast amount of testimony introduced here, and a number of witnesses have been called to enlighten you as to what the facts are. You are to consider the testimony of each witness; you cannot reject the testimony of any one of the witnesses simply because he has been mistaken, or been inaccurate, but if you find such is the case, that a witness has been mistaken, it would warrant you in examining his testimony with more care than you otherwise would. If a witness has deliberately stated that which is untrue as to a material matter in the case, where he has not been corroborated by other credible evidence in the case, [68] you are at liberty to disregard the whole of his testimony. You are to weigh the testimony of each witness, and of all the witnesses, in the same scales. The testimony of one witness may weigh more than the testimony of another; and in determining how much credibility and how much weight you will give to the testimony of any witness, you are at liberty to consider his motives, if any motives have been disclosed. You will consider the reasonableness and

the probability of his story, whether it rings true; and you can consider the witness himself. As I have said here repeatedly, every witness who appears upon the stand is himself an exhibit; you examine the witness and determine from his appearance and his demeanor and his apparent candor or lack of candor, just as you would in ordinary life, how much weight his testimony is entitled to, and how much credence you will give to his story.

There have been frequent contradictions in the testimony; those are for you to solve, and to determine what the truth is; that is what you are here for; your sole purpose here is to determine what is the truth, and by your verdict to give effect to the truth. There has been considerable testimony as to character; and testimony as to good character is permissible testimony in every case of this kind; it is to be considered by you with all other testimony; all the testimony, including the testimony of good character or bad character, is to be weighed together, all the evidence in the case, and upon that, after considering it all, you are to determine whether it shows that the defendant is guilty or not guilty.

The defendant in every case is presumed to be innocent until his guilt is proven beyond a reasonable doubt. A reasonable [69] doubt is a substantial doubt; it is just what the term indicates; it is a reasonable doubt; it is not a possible doubt, it is not a mere suspicion or possibility, but it is a reasonable doubt, such a doubt as would govern you in the more weighty affairs of life. If after a careful consideration of all the testimony there is

such a reasonable doubt, such a substantial doubt in your mind as to the guilt of the defendant, it is your duty to bring in a verdict of not guilty. That presumption of innocence and that rule of reasonable doubt is to be applied to the indictment, it is to be applied to each count in the information, and you are to determine as your judgment dictates, after considering all the testimony in the light of the instructions I have given, whether the charge in the indictment and in each count, and in the information has been proven.

There has been considerable testimony introduced here with reference to the custom of the office, and the manner of making the reports, but I must instruct you now that a statute cannot be modified or repealed by the custom or the manner in which any officer performs his duty. The statute is the law as it is written and when it says that an officer must report violations of the law, it means just what it says, and it cannot be construed to mean that he need not report violations unless he has knowledge both of the violation and the person or persons guilty of such a violation. The words undoubtedly were used advisedly by Congress when it approved that statute, and put it on the books.

I don't know, Gentlemen, that there is very much more I can say that will be of assistance to you, but as I said in the beginning this is an important case; we have been a long time trying [70] it; you have heard very patiently a vast amount of testimony; you have seen a great number of wit-

nesses, and have had an opportunity to study them. You will remember that you are here to perform a very important duty; it is a very solemn duty; you are bound under the same oath as the Court, and you are to decide this case according to the law and the evidence. The one thing for you to determine is whether there has been a violation of the law, and whether the defendant has violated it, remembering all the while the presumption of innocence, and that the burden is upon the Government to show his guilt beyond a reasonable doubt, from the evidence.

I think I can safely leave this case to you now, as twelve honest, impartial men, who are willing to decide it, not according to your prejudice, not according to your sympathy but simply to determine whether the law has been violated."

BE IT FURTHER REMEMBERED, that immediately following the giving of the instructions and before the final submission of the case to the jury, the defendant excepted to the refusal of the Court to give defendant's requested instructions, one to four and seven to eight, both inclusive, upon the ground that they contained a correct statement of the law, and based on the theory that the defendant could not be found guilty of a failure to report, unless Curran was guilty also; that the defendant excepted to the instructions given by the Court, and each and every part thereof, the effect of which was to instruct the jury that it was the duty of the defendant to report to the District Attorney violations of the National Prohibition Act,

regardless of knowledge of who the offender or offenders were; that the instructions given by the Court were to the [71] effect that they could find the defendant guilty, irrespective of guilt upon the part of Curran; that the defendant further took his special exception to that portion of the Court's charge in respect to *prima facie* evidence and the burden of proof, as provided in section 33 of the statute read to the jury, in that the same was not applicable except in cases of possession of liquor under circumstances other than transportation, and then applicable only in a case where the possessor was the defendant on trial.

BE IT FURTHER REMEMBERED, that on the conclusion of the trial a verdict of guilty was found by the jury against the defendant in respect to the first count of the information, and verdicts of not guilty in respect to the second, third and fourth counts thereof, to which verdict of guilty the defendant took his exception.

BE IT FURTHER REMEMBERED, that, after the jury had rendered a verdict of guilty, as charged in the first count of the information, the defendant filed a motion in arrest of judgment, as follows:

"I.

That the Court has no jurisdiction to enter judgment upon the information.

II.

That the facts stated in the information do not constitute a public offense."

That said motion in arrest of judgment was by the Court overruled, to which the defendant took his exception.

BE IT FURTHER REMEMBERED, that, thereafter, and before pronouncing sentence, the defendant moved the Court for a new [72] trial of said cause, upon the following grounds:

That the Court misdirected the jury in matters of law;

That the Court erred in the decision of questions of law arising during the course of the trial and excepted to by the defendant;

That the verdict is contrary to law;

That the verdict is contrary to the evidence;

That said motion for a new trial was by the Court overruled, to which the defendant took his exception.

BE IT FURTHER REMEMBERED, that, thereafter, and on the 10th day of December, 1925, the Court rendered its judgment and sentence on said verdict of guilty and adjudged that the defendant be fined in the sum of five hundred dollars, and that he be confined in the County jail of Washoe County, Nevada, until such fine be paid, to which judgment the defendant took his exception.

BE IT FURTHER REMEMBERED, that an order was entered in the minutes of the court, giving to the defendant ten days from the 10th day of December, 1925, to file his proposed bill of exceptions in said cause; that within said time defendant tendered and filed his proposed bill of exceptions,

to which plaintiff interposed and filed certain objections and proposed amendments; that thereafter, and on the 29th day of January, 1926, the proposed bill of exceptions, objections and proposed amendments coming on to be heard before the court, the court made its order settling the bill of exceptions, and by further orders gave the defendant to and including the 11th day of February, 1926, to file an engrossed copy of the bill of exceptions as so settled and allowed, and that the within and foregoing is such engrossed copy, and is defendant's bill of [73] exceptions.

And now, in furtherance of justice, the defendant tenders and presents the foregoing as his bill of exceptions as settled and allowed by the Court in this case to the action of the Court in the various particulars therein set forth, and as containing a correct statement of the proceedings in said cause at the trial and of the material evidence introduced thereon in respect to the first count of the information, upon which a verdict and judgment of guilty were found and entered, requested instructions upon the part of the defendant refused by the Court and all the instructions given by the Court in respect to, or having any bearing upon, the charges contained in the information, and prays that the same may be settled, allowed, signed and sealed by the Judge of this court and filed and made a part of the record, and the same is ac-

cordingly done this, the 11th day of February, 1926.

E. S. FARRINGTON,
Trial Judge.

Stipulated to be correct.

CHAS. A. CANTWELL,
Assistant United States Attorney,
Attorneys for Plaintiff.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Defendant.

[Endorsed]: Filed this 11th day of February, 1926. [74]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. John P. Donnelley, Defendant, said case being No. 6555 on the docket of said court.

I further certify that the attached transcript, consisting of 78 typewritten pages numbered from 1 to 78, inclusive, contains a full, true and cor-

rect transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $30.50, has been paid to me by Messrs. Hoyt, Norcross, Cheney & Hoyt, attorneys for the defendant in the above-entitled cause.

And I further certify that the original writ of error and [77] the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court, this 2d day of March, A. D. 1926.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.

[78]

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[Title of Court and Cause.]

## WRIT OF ERROR.

United States of America,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States in and for the District of Nevada, GREETING:

Because, in the record and proceedings, as also

in the rendition of the judgment of a plea which is in the District Court before you, between the United States, Plaintiff, vs. John P. Donnelley, Defendant, a manifest error hath happened, to the great damage of said defendant, John P. Donnelley, as by this complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of [82] Appeals for the Ninth Circuit, together with this writ, so that you have the same in the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 10th day of December, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] E. O. PATTERSON,
Clerk of the United States District Court, District of Nevada.

Allowed by:

E. S. FARRINGTON,
Judge. [83]

[Endorsed]: Filed this 10th day of December, 1925. [84]

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[Endorsed]: No. 4794. United States Circuit Court of Appeals for the Ninth Circuit. John P. Donnelley, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed March 3, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4794.

JOHN P. DONNELLEY,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

STIPULATION UNDER RULE 23.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-

entitled cause that the parts of the record necessary for the consideration of the assignments of error of the above-named plaintiff in error, as set forth in the record prepared by the Clerk of the United States District Court for the District of Nevada, in the above-entitled cause, are as follows:

Information.
Verdict.
Judgment.
Motion in Arrest of Judgment.
Assignment of Errors.
Bill of Exceptions.
Writ of Error.
Certificate of Clerk.

That in pursuance of the provisions of Subdivision 8 of Rule 23, the Clerk of the above-entitled court shall print those parts of the record only as above designated.

Dated this 10th day of March, 1926.

HOYT, NORCROSS, CHENEY & HOYT,
Attorneys for Plaintiff in Error.
GEORGE SPRINGMEYER,
U. S. Atty.
CHAS. A. CANTWELL,
Asst. U. S. ATTY.,
GEO. A. WHITELEY,
Asst. U. S. ATTY.,
Attorneys for Defendant in Error.

[Endorsed]: Stipulation Under Rule 23. Filed Mar. 11, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy.

## SUPREME COURT OF THE UNITED STATES

ORDER TO SEND UP ENTIRE RECORD AND CAUSE—October 24, 1927

It is ordered that this cause be restored for reargument.

It is further ordered that the entire record in this cause be certified up to the Court in accordance with section 239 of the Judicial Code, as amended by the act of February 13, 1927 (43 Stat. 936), so that the whole matter in controversy may be considered by the Court, and the case is hereby set down for hearing on the 21st day of November next.

October 24, 1927.

Minute entry of argument and submission, May 18, 1926, omitted in printing.

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Certificate of question to Supreme Court omitted in printing; printed under separate cover.

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Clerk's certificate to foregoing transcript omitted in printing.

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25 R. C. L., 1083 and cases cited

# In the Supreme Court of the United States

JOHN P. DONNELLY,
Plaintiff in Error,
—vs—
UNITED STATES OF AMERICA,
Defendant in Error,

No. 582
October Term, 1926
On Certified Question of Law

## BRIEF FOR PLAINTIFF IN ERROR

### QUESTION SUBMITTED

Omitting title of cause and unnecessary verbiage the

> "Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code."

reads:

> "The first count of the information in this case charges than 'on or about 2d day of September, 1922, * * * in Washoe County, State and District of Nevada, * * * then and there being an officer of the United States, namely, Federal Prohibition Director for the District of

Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors * * * did willfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge * * * to the United States Attorney for the District of Nevada, * * *'

"The information contained three other counts of like import, but as to the latter the jury returned a verdict of not guilty. A verdict of guilty was returned as to the first count only, and the judgment on the verdict is now before the above entitled court for review on writ of error.

"Section 2 of Title II of the National Probihibition Act provides:

" 'The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting of offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; * * *'

"Section 29 of the same Act and Title provides:

" 'Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined

for a first offense not more than $500; for a second offense not less than $100 nor more than $1000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.'

"The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

**"Does the neglect or failure of the Commissioner of Internal Revenue, his assistants, Agents or inspectors to reports violations of the National Prohibition Act, coming to their knowledge, to the United States Attorney for the District in which committed, as provided in Section 2 of Title II, and as charged in the information, constitute a violation of any provision of Title II, within the true intent and meaning of Section 29 of said Act and Title?"**

## ARGUMENT

Section 2 of the National Prohibition Act clearly was never intended by Congress to define or embrace a penal offense.

An attempt so to construe the section as to give it a penal character, leads to absurd results. So construed, the Commissioner of Internal Revenue, his assistants, agents and inspectors, are guilty of a misdemeanor if they fail to investigate and report any violation of the Act coming to, or which should have come to, their knowledge. A third derelection would amount to a felony.

The section, so construed, does not stop with making possible criminals out of the Commissioner and other administrative officers mentioned in the Act,

but the United States Attorney is made equally guilty if he fails to prosecute.

So construed, it becomes the duty of the Commissioner, his assistants, agents and inspectors, not only to investigate offenses in connection with liquor violations, but each must investigate every other officer with whom he is associated and report him if such officer has failed so to investigate and report.

For example, apply the section so construed to the facts of the case at bar. Plaintiff in Error, as shown by the record, sent five of his Prohibition Agents to investigate the alleged offense concerning which he was informed against. Each of such agents was as cognizant of the facts as was the Plaintiff in Error. None of them reported the offense to the United States Attorney. Here, then would be five other offenses committed. But that is not all—Plaintiff in Error should have reported the fact that each of his five subordinate officers had failed to report, and for not doing so he would have committed five additional offenses. The section is not even yet satisfied. Each of the five agents should have investigated and reported the failure of their superior officer and for not so doing each would be guilty of an additional offense. Still the section would not be complied with. Each agent should have investigated and reported on his four associates adding four additional offenses to each agent. Add to these the failure of the United States Attorney to prosecute each offense and we would have about seventy-one offenses growing out of the one incident still subject to prosecution, without considering what other officers in the Director's or Commissioner's office might be enmeshed.

It is manifest that Congress never intended any such a ridiculous construction to be placed upon Section 2 of the Prohibition Act.

The section is a purely administrative provision prescribing in the most general language, and not with the particularity required in penal provisions, the duty of administrative officers in investigating and reporting such violations of the Act as are by its terms made "offenses."

If Section 2 of the Act is penal in character, then Congress intended to take all discretion from officers entrusted with enforcement, and they cannot, as has been the practice, without themselves becoming violators, determine what class or character of violators it is most advantageous, for the purpose of real enforcement, to investigate and report, nor determine in any case under investigation when or whether evidence has been secured sufficient to justify prosecution. Congress clearly intended nothing of the kind.

Section 38 of the Prohibition Act provides for three classes of officers, two of which are specifically designated as "executive officers" and as "agents and inspectors in the field service" and the third class includes experts, clerical assistants, etc.

By the very terms of the statute executive officers have nothing to do with the real work of investigating officers. True, they have general direction over such officers and in practice, as is necessary if efficiency is to be considered, have in a large measure, control of the character and scope of their labors—a course they could scarcely pursue if Section 2 were penal.

By the provisions of Sections 1800 and 1810 of Article XVIII of the Regulations prescribed by the Commissioner of Internal Revenue, the Director must maintain an office not to be closed within certain prescribed hours and must be in attendance except on leave or temporary absence. By the terms of the Regulations the Director cannot be an investigating officer in the strict or practical sense. Upon the other hand it is equally as manifest that investigating or field officers are not supposed to make reports to the United States Attorneys of the results of their investigation, which is the appropriate function of the directing officers under whatever name designated.

If Section 2 is penal, it is not enough for an officer either to investigate or report; he must do both, regardless of the general character of his duties, and this of course, applies to the Commissioner of Internal Revenue especially.

If, as was the contention of the Government in the courts below, Section 2 made it the duty of prohibition officers to report offenses even though the offender was unkonwn, then Congress must have intended that such officers should be engaged chiefly in the fruitless task of making reports of mere offenses. While we think this view clearly erroneous, it serves to emphasize the unreasonableness of construing Section 2 as embracing a penal offense.

Section 2 fails to say when reports shall be made. An offense may be discovered, but is may take weeks, months, or even years, to discover the offender and secure evidence to justify prosecution. Must an efficient officer report bare knowledge of an offense,

and thus frustrate efforts to discover the perpetrator, or may he exercise his judgment as to when is the proper time to report? Is a prohibition officer subject to prosecution because his judgment happens to differ from that of a United States Attorney as to when an offense should be reported?

What purpose could be served by reporting knowledge of mere offenses to the United States Attorney, whose duty it is to prosecute "the offenders"? The section does not even provide that the reports shall be in writing.

If Section 2 is penal in character then a prohibition director or other prohibition officer may be seriously handicapped in his labors by an unfriendly prosecuting attorney or by one of his own subordinate officers. If it were necessary, concrete examples, we think, could be shown. It probably would not be difficult, in the case of every directing prohibition officer in the country, to find cases of known violations which were unreported. The more efficient the officer, probably the greater number of cases which were ignored in order that time and effort might be devoted to those of more importance.

Section 2 contains not a single characteristic of a penal statute. Few reading it would ever suspicion that it might be so intended. Even if it had included a specific provision that a violation of it would constitute an offense, an officer could not tell what he would have to do to comply with its terms so as to be immune from punishment.

It is conceded that a violation of Section 2 would not constitute an offense, unless, as contended, it is made so by Section 29. It is respectfully submitted,

that a reading of Section 29 discloses that Congress never intended that section to apply to the purely administrative provisions of the Act.

Section 29 after specifically referring to offenses such as "violating the provisions of any permit," the making of "false records, reports or affidavits required by this title"—all of which appertain to the manufacture and disposition of intoxicating liquor —sets forth the general clause "or violates any of the provisions of this title, for which offense a special penalty is not provided, shall be fined," etc. The general clause, we submit, is limited to the same character of offenses previously specifically mentioned. The rule of **ejusdem generis** is clearly applicable.

The use of the word "offense" in the general clause clearly indicates a legislative intent to prescribe a punishment only for the violation of those forbidden or required acts in relation to manufacture, transportation or disposition of liquor, which was the purpose of the Act to regulate or prevent, and for which offenses a special penalty had not been prescribed.

It is inconceivable that Congress contemplated that the Commissioner of Internal Revenue and his subordinate officers might be repeatedly prosecuted and punished for violating the administrative provisions of the Act.

As said by Baker, District Judge, in U. S. vs. Seibert, 2 Fed. (2nd) 80,

> "If the section provides a penalty for a violation of every provision of the title not otherwise

> specially provided for, a commissioner under Section 26, discovering a person in the act of transporting liquor, and failing to seize the liquor, would be guilty of a violation of a provision of the title and subject to a fine. Section 29 provides the penalties for certain offenses denounced by the title."

If provisions of a statute, claimed to be penal, are so vague that a distinguished jurist failed to note their character, how can it be said that they are sufficiently explicit to be apparent to the common mind?

It has never been the theory of the Government that public officers will perform their duties only in fear of prosecution for derelection of duty. Only in rare instances and exclusively in matters pertaining to public revenues, is a failure to make reports made penal and in those cases the time and character of the report is clearly prescribed as well as the penalty for failure definitely expressed.

See—

> Revised Statutes 3169,
> Compiled Statutes, Section 5889.

As an argument in favor of Section 2 being construed as penal in character, in the brief of counsel representing the Government in the Court below, attention was called to the provisions of Section 3 of the Act—"All of the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented."—and the inference was sought to be drawn that if Section 2 were construed as penal in character, it would be an aid in accomplishing the pur-

poses of the Act. Just how or to what extent the use of intoxicating liquor as a beverage may be prevented, by a construction that would make it the duty of enforcement officers to become spies on each other and to deprive them of discretion in determining whether or no it might be more effective to concentrate on the sources of supply and the big offenders was not attempted to be shown, doubtless for the simple reason it could not be made so to appear.

A construction of the Act which would provide the means for meddlesome interference with the policy of executive enforcement officers would be far from a liberal construction "to the end that the use of intoxicating liquor as a beverage may be prevented."

Counsel for the Government in their brief in the Court below did not cite a single authority in support of the contention that Section 2 should be given a penal construction. With the numerous decisions cited by counsel for Plaintiff in Error in support of "certain rules of construction," they say they "have no quarrel" but that "here they have no application" because "construction is not required where the language is definite and certain as in Section 2 of the Act."

We have endeavored briefly to point out that the language of Section 2 is neither definite nor certain, and it is our contention that it was designedly made general in character in order to give enforcement officers a wide latitude of discretion essential to effective enforcement.

Even if the language of Section 2 was as definite and certain as contended, there would still remain

the question whether its violation is made penal "under the true intent and meaning of Section 29."

Courts in general and this Court in particular have so definitely laid down the rules applicable to the construction of penal statutes that we will state but a few principles deemed controlling together with a few leading authorities.

A new offense will not be deemed to have been created by statute unless the legislature has expressed its will in language sufficiently explicit to be apparent to the common mind. It is only when a statute clearly and plainly subjects parties and acts to its denunciation that they may be lawfully punished thereunder.

Connally vs. Gen. Con. Co., 70 Law Ed., 163
United States vs. Noveck, 70 Law Ed. 532
United States vs. Katz, 70 Law Ed., 554
United States vs. Reese, 92 U. S., 14.
First National Bank vs. U. S., 206 Fed., 374.

The language of a statute must be such as to leave no doubt as to the intention of the legislature and where there is a well founded doubt as to an act being a public offense it must be resolved in favor of the liberty of the citizen.

First National Bank vs. United States, supra.
United States vs. Wiltberger, 5 Wheat, 76
McCord vs. State, 101 Pacific, 280
25 R.C.L., 1083 and cases cited.

To the general proposition that penal statutes are strictly construed and that an act is not to be held to be penal in character unless the legislature has in

express language clearly made manifest its purpose, we cite the following additional authorities:

United States vs. Mo. Pac. Co., 213 Fed., 169
St. Louis Term. Co. vs. United States, 188 Fed., 191
Martin vs. U. S., 168 Fed., 198
Erbaugh vs. U. S., 173 Fed., 433
N. P. Ry. Co., vs. U. S., 213 Fed., 162
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State vs. Col. Inc. Co., 124 N.W. (Wis.) 502
State vs. Breffeihl, 40 L.R.A. (N. S.) 535
Western Union vs. Axtell, 69 Ind. 199
People vs. Doyle, 110 Pac. (Cal.) 458
State vs. Eden, 158 Pac. (Wash.) 967
State vs. Furth, 144 Pac. (Wash.) 907.

Applying the principles of these authorities to the question before the Court, we respectfully maintain that all that was intended by the provisions of Section 2 of the National Prohibition Act was to invest the Commissioner of Internal Revenue and his subordinate officers with the responsibility of investigating violations of the Act and reporting them to the United States Attorney; that this intention was not enlarged or transformed into the creation of a criminal offense for neglect to discharge such responsibility by the provisions of Section 29 of the Act, for Section 29 has to do only with those offenses which have been expressly created by the Act and for which a special penalty was not prescribed and

cannot properly be construed to create any new offense not denunciated as such by the Act.

It is respectfully submitted that the question propounded by the Circuit Court of Appeals for the Ninth Circuit should be answered in the negative.

FRANK H. NORCROSS,

HENRY M. HOYT,
Attorneys for Plaintiff in Error.

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# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 110

JOHN P. DONNELLEY

*v.*

THE UNITED STATES OF AMERICA

*On Certificate From the United States Circuit Court of Appeals for the Ninth Circuit*

## PETITION FOR REHEARING BY PLAINTIFF IN ERROR

Comes now Plaintiff in Error and, by leave of Court, petitions this Honorable Court to grant a rehearing of the above entitled cause, as determined by decision of date April 9, 1928, and respectfully submits as reason therefor, the following:

### STATEMENT OF REASONS OR GROUNDS

1. That portion of the opinion of the Court reading: "But defendant failed to submit any other brief or to file any statement of points or specifications of errors intended to be urged here" —is erroneous. Briefs were filed on behalf of

the Plaintiff in Error upon all the questions of law raised upon the entire record. Such briefs contained a statement of points or specifications of error intended to be and which, were both therein and in oral argument urged upon this Court.

2. That there has been presented to this Court important questions of law which have not been determined, the determination of which are essential to the question whether John P. Donnelley is guilty of the alleged offense for which he was convicted.

3. That in the Transcript of Record filed in this Court beginning on page 11 thereof and ending on page 19, are fifteen specific assignments of error, which in the brief of Plaintiff in Error filed upon the entire record, at pages 8 and 9 thereof are grouped into three main classifications,—quoted from said brief—as follows:

"QUESTIONS OF LAW PRESENTED ON RECORD

The question of law presented upon the record of this case may be classified in three groups in the order in which they will be presented in the argument.

(a) That the count of the Information upon which defendant was adjudged guilty fails to state an offense. (Assignment of error No. 3, Transcript pp. 11, 46, 47.)

(b) That the jury was misinstructed in matters of law. (Assignments of Errors Nos. 7, 8, 9, 10, 11, 12, 13, 14 and 15, Transcript pp. 12 to 19, 45, 46.)

(c) That the evidence was and is insufficient to support the verdict and judgment thereon. (Assignments of Errors Nos. 1, 2, 4, 5, and 6, Transcript pp. 11, 12, 45, 46.)"

4. That the Court materially erred to the injury of Plaintiff in Error in its conclusions respecting the one question determined—whether a violation of Section2 of the National Prohibition Act is an offense within the true intent and meaning of Section 29 of said Act—the errors being in the following particulars:

(a) The Court held that said Section 29, "declares that violators of any provision shall be punished" when said section in fact reads: "Any person who violates any of the provisions * * * * * **for which offense** a special penalty is not prescribed, shall be fined" etc. (Italics ours.) The effect of such holding being to eliminate as unnecessary or meaningless the words of the statue "for which offense"—contrary to fundamental rules of statutory construction to the effect that the entire language shall be considered and given effect.

(b) The Court, by use of the expression—"intentionally failed to report,"—in effect, read into the statute as definitive of the offense, for which Defendant in Error was convicted—intentional failure, when no such language appears in the statute. Where the intent with which an act is done is made the gist of an offense the legislative power must clearly so prescribe.

(c) The Court in its opinion failed to apply or advert to the rule contended for by Plaintiff in

Error, and conceded by the briefs for the Government to be correct and applicable, concerning the determination of asserted new statutory offenses, such rule being as stated in the Government's brief on the entire record, as follows: "In order that an act or ommission may be held to constitute an offense it must be so declared by Act of Congress 'in language that need not deceive the common mind,' for 'every man should be able to know with certainty when he is committing a crime.' (United States vs. Reese, 92 U. S., 214, 220."

Brief for the United States (November, 1927) p. 11.

(d) The Court in its opinion failed to apply the well established rule in determining whether a statute should be construed to be penal in character that where there is a well founded doubt as to an act being penal in character it must be resolved in favor of the liberty of the citizen.

(e) The Court in its opinion erroneously holds that "the evidence showed and the verdict, when read in the light of the Court's charge, means that the jury found that Curren was discovered transporting ten barrels of intoxicating liquor and that Plaintiff in Error, with actual knowledge of that violation intentionally failed to report the crime and offender for prosecution." This holding is erroneous for the reason that the jury was never given an opportunity to determine the guilt of Plaintiff in Error by any test as to whether Curren was an offender or that he had knowledge thereof.

Plaintiff in Error was refused the following specific instruction:

"The jury is instructed that the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an offense has been committed against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense."
Transcript of Record pp. 12, 12, 33.

The Court's instructions to the jury eliminated the question of whether Curran was an offender or whether any offender was known. The effect of the instructions was to say to the jury that knowledge of a mere offense without knowledge of an offender required a report and failure to report constituted an offense.

Instructions given on this point were as follows:

"It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violates it. * * * * In this case if Curran was transporting whiskey (beer) and he didn..'t know it was whiskey, the jury might say he didn't intend to violate the law, therefore he cannot be convicted, nevertheless there was a violation of the law in that he had possession and was transporting liquor along a public highway. * * * * The statute is the law as it is written and when it says that an officer must report violations of the law, it means just what it says, and it cannot be construed to mean that he need not report violations unless he has knowledge both of the violation and the person guilty of such violation. * * * * The one thing for you to determine is whether the defendant has violated it."
Transcript of Record pp. 16, 17, 18, 38, 39, 44, 45.

The exception taken by Plaintiff in Error in respect to these requested instruction refused and those given upon the particular question dealt with in the opinion of this Court is as follows:

"The defendant excepted to the refusal of the Court to give defendant's requested instructions, one to four and seven to eight, both inclusive, upon the ground that they contained a correct statement of the law, and based on the theory that the defendant could not be found guilty of a failure to report, unless Curran was guilty also; that the defendant excepted to the instructions given by the Court, and each and every part thereof, the effect of which was to instruct the jury that it was the duty of the defendant to report to the District Attorney violaions of the National Prohibition Act, regardless of knowledge of who the offender or offenders were; that the instructions given by the Court were to the effect that they could find the defendant guilty, irrespective of guilt upon the part of Curran."

Transcript of Record pp. 45, 46.

f) The Court inadvertently misconceived the contentions in this case in holding: "The substance of the contention is that intentional failure of a prohbiition director or other enforcement officer having knowledge of crimes and offenders against the Act, to report them to the United States is not a punishable offense." The contention of the Plaintiff in Error was that the failure of the Commissioner of Internal Revenue, his agents or assistants to report to the United States Attorney as required by the provisions of Section 2 of the National Prohibition Act was not an offense within

the true intent and meaning of Section 29 of the Act, and further that Section 2 did not require report of mere knowledge of an offense but only in case where the offender also was known.

ARGUMENT

1. A statement of points and specifications of error urged upon the Court with brief supporting the same was filed with the Clerk of this Court.

By consent of the Clerk of the Court and with the approval of the Solicitor General, the briefs upon the part of Plaintiff in Error as filed in the Circuit Court of Appeals, were permitted to be filed in this Court.

In respect to this matter the following excerpts from correspondence between the Clerk of this Court and counsel for Plaintiff in Error is submitted:

"Reno, Nevada, Oct. 28, 1927.

Hon. Charles Elmore Cropley,
Clerk of the Supreme Court of the United States,
Washington, D. C.

Dear Sir:

**Re: Donnelley v. U. S. No. 110**

We note that the Supreme Court has ordered that the entire record in this case be certified up to the Court so that the whole matter in controversy may be considered by the Court, and that the cause is set for hearing on the 21st day of November next.

We are not familiar with the practice in cases where this procedure is taken, but assume that

it will not require any additional printing of the record in your office. We assume, also, that it will not require the printing of additional briefs, but that the briefs filed in the Circuit Court of Appeals for the 9th Circuit may be used upon the hearing before the Supreme Court. If we are incorrect in this view, we would appreciate your advising us in respect to the same.

NORCROSS & CHENEY
By FRANK H. NORCROSS".

"OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

November 3, 1927

Norcross & Cheney, Esqs.,
Reno, Nevada.

Gentlemen:

* * * * * * * * * * *

If you feel that the briefs already on file cover everything they should, it will not be necessary to file new briefs for the next hearing of the case.

Yours truly,
CHARLES ELMORE CROPLEY, Clerk,
By Reynolds Robertson,
Ass't."

RR:CZ

Reno, Nevada, November 9, 1927.

Hon. Charles Elmore Cropley,
Clerk, Supreme Court of the United States,
Washington, D. C.

In re Donnelley v. United States
No. 110, Supreme Court,
1927 Term.

Dear Sir:

Yours of the 3rd inst. relative to the case of

Donnelley vs. United States, No. 110, October Term, 1927, received.

We also received from the Clerk of the Circuit Court of Appeals ten copies each of the opening and closing briefs filed on behalf of Capt. Donnelley in that court. We have added to these copies four extra copies which were available in our office, and are mailing the same to you. We hope this number of copies will be sufficient for your purpose so that the printing of additional copies of our briefs filed in the Circuit Court of Appeals will be unnecessary. Immediately upon receiving notice of the setting of the case for hearing on November 21st next, we mailed copies of our briefs filed in the Circuit Court of Appeals to the Solicitor General and to Assistant Attorney General Willebrandt.

As stated in our prior correspondence, we are anxious to reduce the expense to Capt. Donnelley to a minimum. Capt. Donnelley would not care to file an affidavit in **forma pauperis**, nor do we think that he is in such financial condition that he would be justified in doing so. However, he is in straightened circumstances due to financial reverses, protracted illness and ill health preceding and following the trial of this cause. Any absolutely necessary expense we will take care of.

We are enclosing an index for the briefs if it is necessary for the same to be printed and added with new covers to the briefs mailed.

Very truly yours,

NORCROSS & CHENEY,

By FRANK H. NORCROSS."

(9)

No. 110

# In the Supreme Court of the United States

October Term, 1937

JOHN P. DONNELLY

v.

THE UNITED STATES OF AMERICA

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF FOR DEFENDANT IN ERROR

"Reno, Nevada, November 15, 1927.
Hon. Charles Elmore Cropley,
Clerk, Supreme Court of the United States,
Washington, D. C.

In re: Donnelley v. United States
No. 110, Supreme Court,
1927 Term.

Dear Sir:

Supplementing our letter to you of the 9th inst., we have to advise you that the writer will be unable to be present in Washington on the 21st inst., the date set for the submission of the case of Donnelley vs. United States.

The writer will, therefore, avail himself of the privilege of requesting you to submit the cause on behalf of the Plaintiff in Error on the briefs filed on behalf of the Plaintiff in Error in the Supreme Court of the United States and in the Circuit Court of Appeals for the 9th Circuit.

Very truly yours,
NORCROSS & CHENEY
By Frank H. Norcross."

"OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

November 15, 1927

Norcross & Cheney, Esqs.,
Reno, Nev.

Gentlemen:

I have your letter of the 9th instant with reference to the case of Donnelley vs. United States, No. 110, October Term, 1927.

I note that you are sending me 14 copies of the

opening and closing briefs in the Circuit Court of Appeals, and further that you served copies of these papers upon the Solicitor General and Assistant Attorney General Willebrandt.

While the rule of the Court requires that 40 copies of briefs be on file, under the circumstanes I will accept these briefs. I will accordingly have them recovered if necessary when they reach me, and file them as the briefs for Captain Donnelley in the case.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,
Per Reynolds Robertson,
Assistant."

RR-F

"OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

November 18, 1927.

Norcross & Cheney, Esqs.,
Reno, Nev.

Gentlemen:

I thank you for your letter of the 15th instant, with reference to the case of Donnelley vs. United States, No. 110, October Term, 1927.

As requested therein, I will submit on briefs for Captain Donnelley when the case is called.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,
Per Reynolds Robertson,
Assistant."

"POSTAL TELEGRAPH—TELEGRAM

Reno, Nevada, Nov. 20, 1927.

Hon. Charles Elmore Cropley,
Clerk of Supreme Court of United States,
Washington, D. C.

You are requested to submit case of Donnelley versus United States Number One Hundred Ten on behalf of plaintiff in error to Supreme Court on briefs filed in Supreme Court and Ninth Circuit Court of Appeals. Stop Letter same effect dated fifteenth sent air mail. Stop Transcript and yours fifteenth reecived.

Frank H. Norcross."

A letter of date November 2, 1927, written by Hon. William D. Mitchell, Solicitor General, to counsel for plaintiff in error and covering the very matter of use in this Court of briefs filed in the Circuit Court of Appeals, contains the following excerpt:

> "I suggest that you write to the Clerk of the Supreme Court and tell him your situation and follow his suggestions in the matter."

Counsel for Plaintiff in Error are advised by the Clerk of this Court that he distribute copies of the said briefs to each of the members of this Court.

It may be conceded that in some purely technical respects the strict letter of the Rules of this Court were not complied with. It is true that there were only fourteen instead of forty copies filed, and a formal filing of acknowledgment of receipt of service of copies by the Solicitor General may not have occurred. However, the number filed was

sufficient for all practical purposes, and such number was accepted for the purpose of the case by the Clerk. The briefs filed on behalf of the United States discussed all the questions raised in the briefs of Plaintiff in Error and no questions were raised by counsel for the Government that the points urged in the briefs, included in the assignments of error and embraced in the Bill of Exceptions were not properly before the Court.

The cases cited in the opinion of the court, we respectfully submit, we think are not in point in the situation presented in this case. In Southwestern Express Co. v. Robertson, 264 U. S., 541, it was held, quoting from the sylabus: "The Supreme Court of the United States will not consider assignments of error appearing in the record, but not mentionde in the argument." In Home Benefit Association v. Sargent, 142 U. S. 691, 694-695, the Court in its opinion said: "Although there are twenty-five alleged errors set forth in the assignment of errors filed in the Court below, yet, as the brief of the plaintiff in error relied on but a few of them, we confine our attention to those thus relied on."

Unless the briefs filed by plaintiff in error in Circuit Court of Appeals and used for filing and filed in this Court are wholly disregarded, the rule applied in the decisions cited have no application to this case. All errors assigned in the record were argued in the said briefs. In respect to errors assigned and argued in respect to instructions, the Government's brief conceded material error in respect to instructions requiring reports where the offender was unknown. The decision rendered in

this case, as we understand it, holds that reports are only required where an officer "having knowledge of crimes and offenders" fails to report. The conviction of the defendant in the case we think entirely due to the several instructions to the effect that knowledge of an offence only required a report.

The Court in Green v. Elbert, 137 U. S., 615, 621, speaking through Chief Justice Fuller, said:

> "To the proper conduct of the business of this Court rules are necessary, and having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the consequences can only be extended where the circumstances furnish adequate excuse."

In this case it is respectfully urged that there was a reasonable compliance with the rules and to the extent they may have been disregarded the circumstances affords impelling reasons for the Court to grant its dispensation, especially so as no objection was interposed by counsel for the Government and no one could have been misled or injured by the technical non-compliance approved by the Clerk of this Court.

2, 3,

The Bill of Exceptions, the assignments of error and the briefs (assigning the same should be considered) filed, presented important questions of law, affecting the question of guilt or innocence of defendant, in addition to the one point decided. Without attempting here a reference to all the assignments of error it should be sufficient, we think, to call to the attention of the Court the

matter of assignments of error considered in the briefs upon both sides respecting instructions given by the Court to the effect that defendant could be found guilty if knowledge of an offense upon his part was shown without knowledge of the offender and the refusal to give requested instructions that the contrary was the law. The instructions requested and refused and those given upon this question are set out in full in reason 4 e supra.

The Court in its opinion, as we construe it, holds that guilt of a crime upon the part of a Prohibition officer does not attach unless such officer—to quote from the opinion—"having knowledge of crimes and offenders against the Act "fails to report them." So holding, the Court, if it will consider the assignments of error argued, must also we submit hold that prejudicial error occurred in respect to these particular instructions.

While the brief for the United States does not concede error in respect to all the instructions requested and refused and those given concerning this question it does concede error in the case of one of the number refused and one given. From the Government's brief we quote:

> "Request No. 3, (R. 13) asked the Court to instruct the jury 'that the knowledge upon his part making it obligatory for him to so report consists of sufficient evidence in his possession to reasonably justify prosecution,' and that this related both to the fact that an offense had been committed and to the identity of offender. This request was proper and we know of no good

reason why it or the substance of it was not given."

Brief for the United States pp. 19, 20.

"As these allegations were undoubtedly essential to apprise the defendant of the accusation against him, the instruction that the jury might convict, although finding that Carran had not committed the violation alleged, appears to have been erroneous."

Brief for the United States p. p. 22, 23.

True a "Memorandum for the United States on Reargument" was subsequently filed in which the Solicitor General does not appear to have joined, and in which there appears a reversal of position by a portion of counsel for the Government in respect to the matter of instructions as well as upon the question originally certified by the Circuit Court of Appeals, but the question as we view it here, is not whether counsel for the Government were correct in the position taken in their "brief" or the contrary position taken in their "memorandum" but that it is one of importance to plaintiff in error and was submitted to the Court for its decision.

4a. The Court in its opinion failed to give weight to the word—"offense"—appearing in Section 29 of the Act. The effect of the opinion is to eliminate that word. The word, however, is there and settled rules of construction require that it be considered and given effect. It was designedly used by Congress. We submit that no other meaning can be given to it, without effecting its elimination, than to say that it means that acts of

commission or omission in other sections of the statute therein declared to be an offense and for which no special penalty is provided shall be punished.

In the brief for the United States after citing decisions of the Court laying down rules governing the construction of penal statutes and citing provisions in numerous Federal statutes appears the following conclusions:

> "All through Title II, interwoven with prohibitions against liquor traffic, are found many directions to administrative officers intended to prescribe the procedure to be followed. We think that Section 2 was similarly intended to prescribe an administrative course to be followed, and that the provision in Section 29 for punishment of any person who violates any of the provisions of the title was not intended to brand as criminal the failure of administrative officers or United States attorneys to perform any one of the inumerable duties imposed upon them by Title II."
>
> Brief for the United States, Page 17.

While in two briefs filed in behalf of the United States the opinion is definitely expressed that the question propounded by the Circuit Court of Appeals should be answered in the negative, the "Memorandum" brief filed upon re-argument presents a contrary argument in which appears what seems to us to be some very remarkable statements unless the liberty of a citizen in certain cases is to be now subject to some new

rule of construction of penal statutory provisions. The "Memorandum" brief concludes with the statement (page 21) that "Despite the fact that the better view may be that the statute does not describe an offense, it must be conceded that the effect of so interpreting the statute * * * * would be to favor the lawbreaker" etc. At the opening of the "Memorandum" brief is to be found this statement: "Recognizing the administrative desirability of sustaining the lower Court's interpretation, and because the question is one of first impression and a close one, the following additional observations in support of the construction placed upon the Act by the District Court are hereby submitted."

It is stated in the brief for the United States (p. 11) "in order that an act of omission may be held to constitute an offense it must be so declared by Act of Congress 'in language that need not deceive the common mind,' for 'Every man should be able to know with certainty when he is committing a crime' (United States v. Reese, 92 U. S., 214, 220.)" How can it be argued that even "a close question" should be resolved against the liberty of the citizen to say nothing of "the fact that the better view" is in favor of such liberty. We most respectfully submit that even "administrative desirability" is not sufficient reason for suspending the rule that a well founded doubt as to an act being a public offense is to be resolved in favor of the liberty of the citizen which has been generally applied by the Courts since the opinion of Chief Justice Marshal in United States vs. Wiltberger, 5. Wheat. 76. If Congress failed to express itself with that certainty which the

rights of liberty presupposes, the remedy is still with Congress. Otherwise, as said by this Court in Reese case cited supra: "This would, to some extent, substitute the judicial for the legislative department of Government."

4. b. The word "intentional" does not appear in Section 2 or in Section 29 of the Act. If Section 2 defines an offense it is that of failing to report a known offense and offender. How can it be said that the gist of that offense shall be the intent or motive back of the failure unless resort is had to construction approaching at least closely to what is called judicial legislation. It is difficult to conceive that a legislative body will undertake to define a particular offense and omit to mention its most important element. Apparently when Congress in the Act wished to make intent an element in an act it provided to be enjoined it clearly said so as in Section 23. If intentional failure is the crime declared in the statute, then that should be the charge made in the information. There is no charge of intentional failure unless resort is had to further construction that other language used was its equivalent.

This case was not tried upon any theory that any particular intent or motive was an element of the case. There were no intentions to that effect.

4. c. d. These reasons or grounds have been covered in foregoing argument.

4 e. The Court in its opinion saying—"The evidence showed and the verdict, when read in the light of the Court's charge, means that the jury found that Curran was discovered transporting ten barrels of intoxicating liquor and that plain-

tiff in error, with actual knowledge of that violation, intentionally failed to report the crime and offender for prosecution."

We most respectfully but earnestly submit that it cannot be said that "the verdict when read in the light of the Court's charge means that the jury found that Curran was discovered" knowingly "transporting ten barrels of intoxicating liquor and the plaintiff in error with actual knowledge of that violation, intentionally failed to report the crime and offender for punishment." The Court specifically instructed the jury that " the statute * * * * * cannot be construed to mean that he need not report violations unless he has knowledge both of the violations and the person guilty of such violation."

The jury was not called upon to determine the question of the guilt of Curran as an essential element of the guilt of defendant. Besides, whatever the guilt of Curran, the question in respect thereto was the knowledge possessed by Donnelley on or about September 2, 1922 (R. 2). It is, we submit, not just or fair to Donnelley for this Court to indulge in any assumptions of knowledge upon his part of Curran's guilt in the light of the instructions and the evidence. The instructions told the jury in effect that Curran's guilt was immaterial. Curran may have been guiltless of intentional wrong, but, nevertheless, someone was causing the liquor to be transported on the highway and some one was guilty of that offense. There was an offense and Donnelley was aware of that. That much was a certainty. That much the

jury was advised was all that was necessary to require a verdict of guilty.

If the jury had been instructed that in order to convict Donnelley they must be satisfied of the guilt of Curran and that Donnelley had knowledge of that guilt, no conviction in our judgment would ever have been obtained. However, that may be, such guilt upon the part of Curran and the knowledge thereof upon the part of Donnelley was an essential element in the case to be established by the Government under proper instructions to the jury.

The question of the sufficiency of the evidence is considered at length in the brief of Plaintiff in Error pages 28 et. seq. Certain points in respect thereto showing that knowledge upon the part of defendant of Curran's guilt could by no possibility be deemed an established fact may here be briefly adverted to. The Record (p. 20) shows that Curran was "then and now a drayman engaged in the business of drayage for hire in the City of Reno." There was nothing manifest at the time of the seizure that Curran knew that the unmarked barrels he was transporting contained liquor. He made an explanation of the circumstances of his having the load which at the time, at least, did not appear to be untrue. It then was apparent that no matter what the knowledge of Curran was, Curran was not the principal offender. Donnelley told officer Dubois that "he would let Curran go and let him take his truck, that we could get him at any time." x (R. 22), "All field officers under defendant had general instructions to investigate and report to him violations." (R. 23.) It

was the duty of the field officers to continue the investigation and there is nothing in the evidence to indicate they did not do so, certainly no obstacles were put in their way by defendant Donnelley who took the position "if we got evidence that Curran did know, we would complete our case and make a report." (R. 24). Donnelley was an executive officer under the provisions of Section 38 of the Act and not an investigating officer or an agent "in the field service." The rules adopted restricted his duties to office service, see first brief for Plaintiff in Error, p. p. 5, 6. Even with all the circumstances relied upon by the Government at the trial, there is nothing in the record from which a court might say that the jury under proper instructions would have imputed knowledge of Curran's guilt to Donnelley and that the latter intentionally failed to report. Indeed, we believe if the question had been submitted a verdict of not guilty would have promptly been returned.

We trust that we may be pardoned in saying that the Plaintiff in Error would not be in this Court or in any other Court of Appeals if there was involved merely the question of a fine. To the Plaintiff in Error there is the bigger question of the closing of a long career as a trusted peace officer with conviction of violation of duty. For that reason he asks for a trial upon issues of fact and law as they really are and not on such law as is given in the instructions of the Court. An impelling reason why we think defendant should be entitled to such trial is the fact that the information was filed by and the prosecution directed by

a United States Attorney whose "relations with the defendant were unfriendly." (R. 29).

We are advised that upon the argument of this case counsel for the Government made the statement that by reason of Donnelley's failure to report the statute of limitations was enabled to run against the prosecution of Curran. If such statement was made it was through inadvertence, for the record shows that the United States Attorney had knowledge of the matter at least as early as March, 1923, six months after the beer seizure. The testimony of the United States Attorney being "that he never heard of the beer seizure from the Curran truck until March, 1923, when it was being destroyed by order of the Court." (R. 24). An order for the destruction of the beer, necessarily obtained through the office of the United States Attorney was "made on March 5, 1923, the order containing the following descriptive language: 'No case—ten barrels of beer'." If the Government ever had any case against Curran and desired to prosecute him, the office of the United States Attorney had knowledge or at least the means of obtaining knowledge at least as early as March 5, 1923. We think it is inconceivable that the office of the United States Attorney could have applied for and obtained an order for the destruction of the beer and have so designated it as "No case—ten barrels of beer" without having received information of the affair from the Director of Prohibition.

4 f. This reason or ground respecting the contention in the case has been sufficiently covered

in other portions of this petition and is we think sufficiently manifest from the statement itself.

### SUBSTITUTION OF ATTORNEYS

Since this cause was certified to this Court Hon. Henry M. Hoyt, one of the attorneys for Plaintiff in Error died, and recently Hon. Frank H. Norcross the other associate attorney has been appointed United States District Judge for Nevada and for that reason retiring from the case and substituting the undersigned attorneys.

It is respectfully submitted that the petition for rehearing should be granted.

CHARLES J. KAPPLER
SARDIS SUMMERFIELD
TALMAGE L. SMITH
Attorneys for Plaintiff in Error.

## CERTIFICATE OF COUNSEL

We the undersigned Attorneys and Counsel for Plaintiff in Error do hereby certify that the within and foregoing Petition for Rehearing is presented in good faith and not for delay.

CHARLES J. KAPPLER

SARDIS SUMMERFIELD

TALMAGE L. SMITH
Attorneys for Plaintiff in Error.

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# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 110

JOHN P. DONNELLEY

*v.*

THE UNITED STATES OF AMERICA

*ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF ON BEHALF OF THE UNITED STATES

### OPINIONS BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Ninth Circuit. The decision of the District Court was not reported.

### JURISDICTION

Jurisdiction is conferred upon this Court by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The facts in this case are set out in the certificate, pages 1 and 2, as follows:

> The first count of the information in this case charges that, " on or about the 2d day of September, 1922, and before the filing of this information, in Washoe County, State and District of Nevada, within the jurisdiction of this court, then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, appointed and acting under the authority of the National Prohibition Act, and then and there knowing of and having actual knowledge of violations of the National Prohibition Act by one James A. Curran in the wilful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about said September 2, 1922, in an automobile truck from those certain premises known and described as 'James McKay's Place,' situate on the South Virginia Road about two miles south of Reno, in Washoe County, State and District of Nevada, along and upon the highway, to wit, the South Virginia Road, to the city of Reno, Washoe County, State and District of Nevada, he, the said defendant, John P. Donnelley then and there having knowledge, as aforesaid, of the said violations of the

National Prohibition Act by the said James A. Curran, did wilfully, unlawfully, and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act."

The information contained three other counts of like import, but as to the latter the jury returned a verdict of not guilty. A verdict of guilty was returned as to the first count only and the judgment on the verdict is now before the above entitled court for review on writ of error.

### THE QUESTION CERTIFIED

Does the neglect or failure of the Commissioner of Internal Revenue, his assistants, agents, or inspectors to report violations of the National Prohibition Act, coming to their knowledge, to the United States Attorney for the district in which committed, as provided in Section 2 of Title II, and as charged in the information, constitute a violation of any provision of Title II within the true intent and meaning of Section 29 of said Act and Title?

## THE STATUTE INVOLVED

Section 2, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305, 308; U. S. C., Title 27, Sec 11), provides:

> The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States * * *.

Section 29 of the same Act and Title (U. S. C., Title 27, Sec. 46) provides:

> Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.

## ARGUMENT

### CONSTRUCTION OF THE STATUTE

We quote the following from an unreported memorandum opinion by the trial court in this case:

> We have here a public statute imposing a duty on certain officers, and the same statute in a subsequent section, prescribing a penalty for willful failure to perform the duty. It is impossible to construe the statute otherwise. Similar statutes have been upheld and enforced. *State* v. *Gluck,* 49 Kans. 533; *Bledsoe* v. *State,* 130 Ark. 122; *State* v. *Darling,* 89 Maine, 400; *State* v. *Williams,* 109 Ark. 465.

Though the statutes referred to are directed to the same purpose as the charge in this case, their structure is not so similar that the cases cited may afford much aid in the interpretation of the sections of the National Prohibition Act here involved. Thus *State* v. *Gluck* is based upon a statute clearly defining a crime for an officer's failure to report a violation of the law. *Bledsoe* v. *State* and *State* v. *Williams* are apparently based upon Section 11, c. 40, of the Revised Statutes of Arkansas. This section specifically penalizes a sheriff who fails or refuses to perform duties required of him by law. *State* v. *Darling* does not involve the construction of the statute upon which the indictment was based.

There is precedent in previous Acts of Congress for penalizing the failure of certain officers to report a violation of specific laws. Those affected by this character of legislation are: Revenue officers, customs officers, officers of the Alaska Game Commission, guides authorized by the Alaska game laws and certain officers of the District of Columbia.

Thus the first legislation of this character by Congress is the Act of July 18, 1866 (c. 201, 14 Stat. 178, 179, 188). Section 7 required Collectors of Customs to report violations of the Revenue laws to the United States Attorney within 10 days, and Section 42 imposed a penalty for failure. The Act of March 3, 1873 (c. 244, 17 Stat. 580), amended Section 7 to include Collectors of Internal Revenue and it was subsequently carried into the Revised Statutes as Sections 3164 and 3084.

With but slight amendment, Section 3164 has been successively continued in force by Section 1317 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1146), Section 1311 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 311), Section 1018 of the Revenue Act of 1924 (c 234, 43 Stat. 253, 344) and Section 1115 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 117). (See Appendix, p. 15.)

Section 3084, Revised Statutes, was repealed by Section 642 of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 989), but substantially reenacted by Section 603 of the same Act (p. 984). (See Appendix, p. 15.

Section 42 of the Act of July 18, 1866 (c. 201, 14 Stat. 178, 188), was enlarged and carried into the Revised Statutes as Section 1780. It is now Section 101 of the Penal Code (U. S. C., Title 18, Sec. 188), which provides:

> Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of

> Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such Act or regulation, shall be fined not more than one thousand dollars.

In a like manner the Act of July 20, 1868 (Sec. 98, c. 186, 15 Stat. 125, 165), provided punishment for the failure of any revenue officer to report any violation of the Revenue laws, within his knowledge, to his superior. This became Section 3169 of the Revised Statutes, which in turn was extended to all persons coming under any Revenue or Customs law or the revenue provision of any law by Section 23 of the Act of February 8, 1875 (c. 36, 18 Stat. 307, 312). (See Appendix, p. 7.) See U. S. C., Title 26, Sec. 68.

For the neglect of duty by an employee concerned in the census (c. 2, Sec. 22, 36 Stat. 1, 8, reenacted in c. 97, Sec. 22, 40 Stat. 1291, 1299; U. S. C., Title 13, Sec. 44), for neglect of duty imposed by Alaska Game Commission Act (c. 75, Sec. 15, 43 Stat. 739, 747; U. S. C., Title 48, Sec. 202) and for failure of a guide to report a violation of the Alaska Game Law (c. 162, Sec. 5, 35 Stat. 102, 104), Congress had provided a penalty. And a precedent particularly applicable is found in the Prohibition Act for the District of Columbia punishing any officer who fails to report any information of a violation of that Act. (See appendix, p. 16.)

Moreover, neglect of duty has always been an indictable offense at common law. Russell on Crimes

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(7 Eng. Ed.), 601. And the authorities cited in the memorandum of the trial court disclose that the States have created the same offense by statute. See also *People* v. *Herlihy,* 72 N. Y. Supp. 389; Mechem Pub. Off., Sec. 1022, 1025; Wharton's Criminal Law (9th Ed.), Sec. 1568.

In providing machinery for its enforcement, the National Prohibition Act originally placed all responsibility upon the Commissioner of Internal Revenue. In adapting this machinery to that which theretofore existed in the Bureau of Internal Revenue, Section 28 provided that these new prohibition officers, operating under the Commissioner of Internal Revenue, should have the same power and protection in the enforcement of the Act which is conferred by existing laws upon internal revenue officers. It has already been shown that these officers were subject to punishment for failure to report violations of law within their knowledge. It may well have been that Congress intended to place these new prohibition officers under the liabilities theretofore imposed upon internal revenue officers as well as to provide them with the same power and protection.

Analysis of Title II also discloses that Congress intended that the Government should have all the information possibly available for administrative purposes. Accordingly, it was provided: In Section 7, that a physician should keep a record; in Section 12, that a manufacturer should attach labels

to the containers and packages; and in Section 13, that a carrier should keep a record of shipments. Unquestionably the penal provisions of Section 29 are intended to enforce a compliance with these requirements. Congress even provided a plan for securing information from the violators themselves, for Section 30 protects the Government against a plea of self-incrimination by a witness. Yet the witness is subject to punishment for contempt if he does not testify. In keeping with this general plan of procuring information for the Government, there would be no inconsistency in enforcing by a penal provision the requirement that the officer make the report required in Section 2.

In keeping also with this plan of procuring information, Congress took pains to insure that, when submitted, it should be correct. Section 29, therefore, penalized any person "who makes any false * * * report, * * * required by this title." Thus, if this provision is applicable to the acts of administrative officers, a penalty falls on the officer who, though returning the report, turns in false information. It is unlikely that Congress would permit total evasion of the requirements of Section 2 by returning no report whatever, since this would be equally as dangerous to proper administration of the Act as would be the filing of a false report.

If the language of Section 2—"shall investigate and report"—is construed as a mandate to do a particular thing, there is authority for interpreta-

tion of the words "offense" and "violates" in Section 29 which might indicate that Congress intended that an officer should be subject to prosecution for having failed to make a report to the United States Attorney. This Court has held that "an offense * * * is an act committed or omitted 'in violation of a public law, either forbidding or commanding it'." *United States* v. *Eaton,* 144 U. S. 677, 687. In *State* v. *Case,* 53 Mo. 246, the Supreme Court of Missouri held that a statute requiring an insurance company to file certain statements might be "violated" negatively by nonobservance.

On the other hand, there is precedent for the requiring of reports to be made to the United States Attorney, without providing a penalty for failure so to do, in the following: Seizure for violations of the Act prohibiting aliens from fishing in Alaskan waters (Section 4, Act of June 14, 1906, c. 3299, 34 Stat. 263, 264; U. S. C., Title 48, Sec. 246); violations of the Safety of Employees Act (Sec. 3, Act of May 30, 1908, c. 225, 35 Stat. 476; U. S. C., Title 45, Sec. 18); violations of the Safety Appliance Act (Sec. 6, Act of March 2, 1893, c. 196, 27 Stat. 531, 532, as amended by the Act of April 1, 1896, c. 87, 29 Stat. 85; U. S. C., Title 45, Sec. 6); violations of the Insecticide Act (Sec. 4, Act of April 26, 1910, c. 191, 36 Stat. 331, 332; U. S. C., Title 7, Sec. 128); and violations of the Locomotive Boiler Safety Appliance Act (Sec. 9, Act of February 17, 1911, c. 103, 36 Stat. 913, 916; U. S. C., Title 45, Sec. 34). And

a diligent search has failed to reveal any such legislation applicable to a large class of Federal officers who carry a great burden in the detection of crimes against the United States—to wit, post-office inspectors, secret service operatives, immigration inspectors, and special agents of the Department of Justice.

Applying the penal provisions of Section 29 to the failure to discharge the duty imposed upon the administrative officers under Section 2 would require the application of the same penalties to the failure to comply with the following other duties imposed under Title II.

Section 5. If the commissioner has reason to believe an article does not correspond with the description, he shall give notice to the manufacturer, etc.

Section 8. The commissioner shall furnish blank prescriptions.

Section 9. The commissioner, if he has reason to believe an offense has been committed, shall issue citations, hold hearings, and forfeit permits.

Section 10. The commissioner ~~shall~~ may prescribe the form of records.

Section 26. Officers shall seize liquor transported.

Officers shall arrest person in charge.

Officers shall proceed against such person in court.

Section 29. District Attorney ~~shall~~ ascertain and plead previous conviction.

If Section 29 was intended to cover dereliction in all of these duties, it is unlike previous legislation by Congress upon similar matters. Heretofore, when Congress made penal the neglect of duty by a Government officer, it plainly provided in the statute that the penalty applied to officers.

Then, too, there is reason to believe that Section 29, as a whole, is not quite appropriate to penalize the neglect by officers of the United States of all the duties imposed upon them by Title II. The first provision, "any person violating the provisions of any permit," clearly relates to others than public officials. The second part, "who makes any false record, report, or affidavit," likewise seems to apply to others than public officials. Considering the third clause, relating to those who violate "any of the provisions of this title," in the light of the restricted applicability of the first and second clauses, it does not seem likely that Congress, by using general terms, intended to include within their scope the conduct of public officials in the administration of this law. Furthermore, the penal clauses provide for first, second, and subsequent offenses with no distinction as to the class of offenders. Congress likely did not assume that a public official who had been tried and convicted for failure to perform his duty would be allowed to remain in the service with an opportunity to commit a second or subsequent offense.

The context of Section 2 indicates that there is no substantial difference in meaning between the provision requiring that "the commissioner * * * shall investigate and report violations" and the provision that the United States Attorney "is hereby charged with the duty of prosecuting the offenders." It seems that the first phrase is equivalent to the statement that the commissioner and his assistants are charged with the duty of investigating and reporting violations. This is the only meaning that can be ascribed to the same language when used in Section 2, Title I. (41 Stat. 306.)

All through Title II, interwoven with prohibitions against liquor traffic, are found many directions to administrative officers, intended to prescribe the procedure to be followed. We think that Section 2 was intended to prescribe the administrative course to be followed and that the provision in Section 29 for punishment of any person who violates any of the provisions of the title was not intended to brand as criminal the failure of administrative officers to perform any one of the innumerable duties imposed upon them by Title II.

It is a well-established rule that offenses should be created only in language that need not deceive the common mind, so that every man might be able to know with certainty when he is committing a crime. *United States* v. *Reese,* 92 U. S. 214, 220. Any doubt in that respect must be resolved in favor of the accused.

CONCLUSION

The Government is inclined to the view that the question should be answered in the negative.

Respectfully submitted.

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SEPTEMBER, 1927.

## Appendix

Section 1115 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 117; U. S. C., App., Title 26, Sec. 26), provides:

> It shall be the duty of every collector of internal revenue having knowledge of any willful violation of any law of the United States relating to the revenue, within thirty days after coming into possession of such knowledge, to file with the district attorney of the district in which any fine, penalty, or forfeiture may be incurred, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, setting forth the provisions of law believed to be so violated on which reliance may be had for condemnation or conviction.

Section 603 of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 984; U. S. C., Title 19, Sec. 510) provides:

> It shall be the duty of the collector whenever a seizure of merchandise has been made for a violation of the customs laws to report the same to the Solicitor of the Treasury, and promptly also to report any such seizure or violation of the customs laws to the United States Attorney for the district in which such violation has occurred, or in which such seizure was made, including in such report a statement of all the facts and

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# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 110

JOHN P. DONNELLEY

*v.*

THE UNITED STATES OF AMERICA

*ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

No opinion was rendered by either court below.

### JURISDICTION

Upon the certification to it by the Circuit Court of Appeals of a question of law arising in this case, this Court ordered the entire record sent up for its consideration and the decision of the whole matter in controversy, pursuant to the jurisdiction conferred by Section 239 of the Judicial Code. as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

Under Section 239, *supra,* the case is in this Court with like effect as though brought up on writ of error. As no decision was rendered by the Circuit Court of Appeals, the questions to be decided by this Court are those presented by the assignments of error upon which the case was taken to the Circuit Court of Appeals. The first of these questions is that certified by the Circuit Court of Appeals, as follows:

> 1. Does the neglect or failure of the Commissioner of Internal Revenue, his assistants, agents or inspectors to report violations of the National Prohibition Act, coming to their knowledge, to the United States Attorney for the district in which committed, as provided in Section 2 of Title II, and as charged in the information, constitute a violation of any provision of Title II, within the true intent and meaning of Section 29 of said Act and Title?

If the foregoing question is decided in the affirmative the case presents the following other questions:

> 2. Does Section 2 require a report to the United States Attorney where the investigating officer acquires knowledge of a violation of the National Prohibition Act but not of the person or persons who committed such violation?
>
> 3. Does Section 2 require such a report where in the judgment of the investigating officer the evidence in his possession tending

to show a violation and by whom committed is insufficient to justify a prosecution?

4. Where it is charged in a criminal information that the defendant, in violation of Section 2, Title II, of the National Prohibition Act, willfully failed to report a violation of that Act, alleged to have been committed at a specified time and place by one Curran, is it essential to a conviction of the defendant that the jury find that Curran actually did commit the offense alleged?

5. Was the evidence sufficient to warrant submission of the case to the jury?

## STATUTES INVOLVED

Sections 2 and 29, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305, 308, 316; U. S. C., Title 27, Sections 11 and 46), provide as follows:

> SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to

the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. * * *

SEC. 29. * * *

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. * * *

STATEMENT OF THE CASE

On January 16, 1925, there was filed in the District Court of the United States for the District of Nevada a criminal information in four counts charging John P. Donnelley with various offenses against Section 2, Title II, of the National Prohibition Act. (R. 1–7.) The first count alleged that the defendant—

> * * * on or about the 2d day of September, 1922, * * * then and there being an officer of the United States, namely, Federal Prohibition Director for the District of Nevada, * * * and then and there knowing of and having actual knowledge of vio-

> lations of the National Prohibition Act by one James A. Curran in the willful and unlawful possession and transportation by said James A. Curran, for beverage purposes, of intoxicating liquors containing over one-half of one per cent of alcohol by volume, fit for use for beverage purposes, on or about said September 2, 1922, * * * did willfully, unlawfully and knowingly, and in violation of the National Prohibition Act, fail to report such knowledge of said violations of the law by said James A. Curran to the United States Attorney for the District of Nevada, who was then and there charged with the duty of prosecuting subject to the direction of the Attorney General, the said James A. Curran for said violations of the National Prohibition Act.

The second, third, and fourth counts charged similar failures on the part of the defendant, as such Federal Prohibition Director, to report or to investigate violations of the National Prohibition Act subsequently coming to his knowledge. As there was an acquittal on all but the first count, the allegations of the subsequent counts need not be further noticed.

In so far as it related to the charge contained in the first count, the evidence at the trial was as follows: At all times alleged in the information the defendant was Federal Prohibition Director for the State of Nevada. On the morning of September 2, 1922, some one in the defendant's office received a telephone message that a truck had broken down on

the main highway about two miles from Reno and that in the informant's belief the truck contained a load of liquor. The defendant immediately sent five prohibition agents to investigate. These agents found one James A. Curran, a public drayman, at the place designated, engaged in making repairs to a truck upon which there were ten barrels with no marks thereon indicating their contents. Curran told the agents that he knew nothing of the contents of the barrels; that, responding to a telephone call, he had received the load from another disabled truck, the driver of which he did not know, but who requested him to haul the load to his (Curran's) warehouse, where the driver of the disabled truck would call for it. (R. 19–20.)

One of the officers broke in the head of one of the barrels and removed three bottles having no labels or marks on them. One of these bottles was opened and its contents tasted by several of the officers who recognized the taste as that of beer containing more than one-half of one per cent of alcohol. The other two bottles were taken to Reno and analyzed by a chemist, who found their contents to consist of beer having an alcoholic content in excess of four per cent. After Curran's truck was repaired it was driven by him, in the company of two of the officers, to the city hall at Reno, where, following a report from the chemist as to the character of the beer, the ten barrels were taken from the truck and placed in a Government vault. Shortly after the arrival of the truck at the city

hall the defendant appeared, and after a talk with Curran and several of the officers gave directions permitting Curran to depart with his truck. In reply to an inquiry by Officer Nash, who had taken part in the seizure, whether Curran had been released, the defendant said that he had, because there was no case against him and that Curran had told the defendant that he did not know what was in the barrels. (R. 21.) The defendant was asked by Officer Dubois at the city hall what he intended to do with regard to the case, and answered that he would let Curran go with his truck; that they could get him at any time; and that he, the defendant, would take up the matter with the United States Attorney. (R. 22.) No director's case report or other written report was made by the defendant to the United States Attorney regarding the Curran beer seizure, nor was any mention made of that seizure in the director's monthly report for September, 1922, to the Commissioner of Prohibition at Washington. The beer was destroyed pursuant to an order of the court made March 5, 1923, reciting, "No case—ten barrels of beer." The United States Attorney, called as a witness for the Government, testified that the defendant had made no report to him, oral or written, respecting the Curran matter and beer seizure, and that the witness did not see any newspaper account of such seizure. (R. 23–24.)

Taking the stand in his own behalf the defendant testified that on the day of the seizure and prior

to the release of Curran he went to the office of the United States Attorney and informed him of the seizure, and that the United States Attorney agreed with the witness that Curran should be released; that the witness had made no director's case report to the United States Attorney because "We didn't have a case; if we got evidence that Mr. Curran did know, why, we would complete our case and make a report;" that it was his custom not to make a report where, in his judgment, there was not sufficient evidence, the case being considered under investigation until it was built up and completed; and that during his term as Director the witness had submitted to the United States Attorney approximately 500 case reports. (R. 24.) The Government thereupon introduced in evidence four director's case reports made by the defendant to the United States Attorney, as showing instances in which the defendant had made such a report, although the identity of the person committing the offense was unknown, or the evidence insufficient to justify a prosecution. (R. 24–25.)

A motion by the defendant for a directed verdict at the close of the Government's case, as well as a like motion at the conclusion of all the testimony, was denied. (R. 31–32.) The jury returned a verdict of guilty on the first count, and the defendant moved, in arrest of judgment, that the court had no jurisdiction to enter the judgment and that the information failed to charge an offense. (R. 46.) The motion was overruled, as was also a

motion for a new trial, setting up that the court had misdirected the jury, that it had erred in its decision of questions of law arising in the course of the trial, and that the verdict was contrary to law and to the evidence. The court thereupon sentenced the defendant to pay a fine of $500 and to be confined in the county jail until the fine was paid. (R. 47.)

The defendant took the case to the Circuit Court of Appeals upon fifteen assignments of error (R. 11–19), which are relied upon in his brief filed in that court as grounds for the following contentions (Br. 8–9):

> (*a*) That the count of the information upon which the defendant was adjudged guilty fails to state an offense. (Assignment No. 3; R. 11, 46, 47.)
>
> (*b*) That the jury was misdirected in matters of law. (Assignments Nos. 7, 8, 9, 10, 12, 14, 15; R. 12–19, 45, 46.)
>
> (*c*) That the evidence was insufficient to support the verdict and judgment. (Assignments Nos. 1, 2, 4, 5, 6; R. 11, 12, 45, 46.)

## SUMMARY OF ARGUMENT

The provision in Section 29 that any person who violates any provision of Title II of the National Prohibition Act shall be guilty of a criminal offense does not seem to have been intended to punish administrative officers and United States Attorneys for failure to perform the numerous duties imposed on them by the Act. While the question is one on

which opinions may differ, the better reason supports the view that it was not intended by Section 29 to punish as a crime the failure of an administrative officer to report to the United States Attorney a case justifying prosecution.

If the statute is construed to make that an offense, then it was error for the trial court to refuse to charge the jury that a violation of the Act did not occur unless the official had evidence sufficient to reasonably warrant prosecution.

The other charges refused or given and complained of do not disclose prejudicial error.

If the statute covers the case, the evidence was sufficient to go to the jury on the question whether the plaintiff in error had in bad faith neglected to report for prosecution a case where he had sufficient evidence to warrant prosecution.

## ARGUMENT

### I

### THE CONSTRUCTION OF THE STATUTE

There can be no doubt that the provision in Section 2, to the effect that "The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney," makes it the duty of those officers to investigate, and if a case is disclosed which appears to warrant prosecution to report it to the United States attorney. The question is whether Congress intended to define

and punish as a crime a breach of these duties, as well as of all the others imposed by this statute on administrative officers, when it provided in Section 29 that "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed," shall be subject to criminal prosecution.

At common law it is a public offense, punishable as a misdemeanor, for an administrative or executive officer to refuse or wilfully and knowingly to fail to carry out a duty imposed upon him as such officer by law. Throop, Public Officers, Section 855. There are no common law offenses against the United States (*Pettibone* v. *United States,* 148 U. S. 197, 203), and in order that an act or omission may be held to constitute an offense it must be so declared by Act of Congress "in language that need not deceive the common mind," for "Every man should be able to know with certainty when he is committing a crime" (*United States* v. *Reese,* 92 U. S. 214, 220). In the instant case the District Court treated the failure to report as constituting an offense thus clearly defined by Section 29. In an unreported memorandum opinion rendered upon a demurrer to an indictment based upon the same facts and charging in one of its counts the same offense as that set out in the first count of the present information, the court below said:

> We have here a public statute imposing a duty on certain officers, and the same statute in a subsequent section, prescribing a penalty for wilful failure to perform the duty. It is impossible to construe the statute otherwise. Similar statutes have been upheld and enforced. *State* v. *Gluck,* 31 Pac. 690 (49 Kans. 533); *Bledsoe* v. *State,* 130 Ark. 122; *State* v. *Darling,* 89 Maine, 400; *State* v. *Williams,* 109 Ark. 465.

The cases here cited do not appear to support the point for which they were invoked. *State* v. *Gluck* was a prosecution of a mayor under a statute declaring it to be the duty of certain officers, including mayors, to notify the county attorney of any violations of the Act of which they had notice or knowledge, it being provided in the same section that " if any such officer shall fail to comply with the provisions of this section" he shall be fined. *Bledsoe* v. *State* and *State* v. *Williams* involved prosecutions apparently based upon Section 11, c. 140, of the Revised Statutes of Arkansas, which specifically penalizes a sheriff who fails or refuses to perform duties required of him by law. In *State* v. *Darling* a complaint against a fish and game warden for neglecting to arrest certain violators of the state fishing law was dismissed as an insufficient pleading. No construction of the statute upon which the complaint was based was involved.

Plaintiff in error's claim in the present case is not that Congress lacks power to make a failure of duty on the part of a Federal administrative offi-

cer an offense, but that it has not done so with reference to the duty to investigate and report imposed by Section 2. Statutes by Congress expressly making it an offense for specified officers to neglect or fail in the performance of certain duties have been in force for many years. Thus, Section 42 of the Act of July 18, 1866 (c. 201, 14 Stat. 178, 188), provided a penalty for the failure of "any collector of the customs, supervising or local inspector of steamboats, or other officer," to "neglect or refuse to make any of the returns or reports which he is required to make at stated times by any Act of Congress or regulation of the Treasury Department," etc. This section was carried into the Revised Statutes as Section 1780 and later into the Criminal Code as Section 101 (U. S. C., Title 18, Section 188), which reads:

> Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such Act or regulation, shall be fined not more than one thousand dollars.

In like manner Section 98 of the Act of July 20, 1868 (c. 186, 15 Stat. 125, 165), provided punishment for the failure of any revenue officer to report any violation of the revenue laws, within his knowledge, to his superior. This became Section 3169 of the Revised Statutes, which in turn was extended

to all persons coming under any revenue or customs law or the revenue provision of any law by Section 23 of the Act of February 8, 1875 (c. 36, 18 Stat. 307, 312; U. S. C., Title 26, Section 68).

For neglect of duty by an employee concerned in the census (c. 2, Section 22, 36 Stat. 1, 8; c. 97, Section 22, 40 Stat. 1291, 1299; U. S. C., Title 13, Section 44); for neglect of duty imposed by the Alaska Game Commission Act (c. 75, Section 15, 43 Stat. 739, 747; U. S. C., Title 48, Section 202), and for failure of a guide to report a violation of the Alaska Game Law (c. 162, Section 5, 35 Stat. 102, 104; U. S. C., Title 48, Section 202), Congress provided a specific penalty, as it did also by Section 21 of the Prohibition Act of the District of Columbia (c. 165, 39 Stat. 1123, 1129) in the case of any officer who failed to make the reports required of him by that section.

On the other hand, Congress has in the following statutes required a report of law violations to be made to the United States Attorney without providing a penalty for the failure to perform that duty: Seizure for violations of the Act prohibiting aliens from fishing in Alaskan waters (Section 4, Act of June 14, 1906, c. 3299, 34 Stat. 263, 264; U. S. C., Title 48, Section 246); violations of the Safety of Employees Act (Section 3, Act of May 30, 1908, c. 225, 35 Stat. 476; U. S. C., Title 45, Section 18); violations of the Safety Appliance Act (Section 6, Act of March 2, 1893, c. 196, 27 Stat. 531, 532, as amended by the Act of April 1, 1896, c. 87,

29 Stat. 85; U. S. C., Title 45, Section 6); violations of the Insecticide Act (Section 4, Act of April 26, 1910, c. 191, 36 Stat. 331, 332; U. S. C., Title 7, Section 128); and violations of the Locomotive Boiler Safety Appliance Act (Section 9, Act of February 17, 1911, c. 103, 36 Stat. 913, 916; U. S. C., Title 45, Section 34). And, so far as diligent search has revealed, no such penalties have been provided as to a large class of Federal officers engaged in the detection of crimes against the United States—to wit, post-office inspectors, secret-service operatives, and special agents of the Department of Justice.

Because of the legislation referred to it would seem that whenever Congress has intended to make a neglect of duty by a Federal officer punishable as an offense it has so provided in plain terms, designating the offender by the title of his office, or referring to him as "such officer," or by other unmistakable description.

To construe the penal provisions of Section 29 to apply to the failure to investigate and report requried by Section 2 would necessitate the application of the same penalties to the failure to perform the following other official duties imposed by Title II:

Section 5. If the commissioner has reason to believe an article does not correspond with the description, he shall give notice to the manufacturer, etc.

+ This notice is only to be given if when analysis shows that the permitted article does not correspond with the

refusal of the officer to give notice + himself might reasonably be punished as an offense

Section 8. The commissioner shall cause to be printed and shall furnish blank prescriptions.

Section 9. The commissioner, if he has reason to believe an offense has been committed, shall issue citations, hold hearings, and forfeit permits.

Section 10. The commissioner shall prescribe the form of records.

Section 26. Officers shall seize liquor transported. Officers shall arrest person in charge. Officer shall proceed against such person in court.

Section 29. District Attorney shall ascertain and plead previous conviction.

If Section 29 was intended to cover dereliction in all these duties, it is unlike previous legislation by Congress upon similar matters, for, as hereinbefore shown, whenever Congress has made penal a neglect of duty by a Government officer it has done so by specific provision.

There is further reason to doubt the intention by Section 29, taken as a whole, to penalize the neglect by officers of the United States of all the duties imposed upon them by Title II. The first provision, "Any person violating the provisions of any permit," clearly relates to others than public officials. The second part, "who makes any false record, report, or affidavit," likewise seems to apply to others than public officials. Considering the third clause, relating to those who violate "any of the provisions of this title," in the light of the restricted applicability of the first and second clauses, it does not seem likely that Congress, by using gen-

eral terms, intended to include within their scope the conduct of public officials in the administration of this law. Moreover, the penal clauses provide for first, second, and subsequent offenses, with no distinction as to the class of offenders, and it can hardly be assumed that Congress believed that a public official who had been tried and convicted for failure to perform his duty would be allowed to remain in the service with an opportunity to commit a second or subsequent offense.

All through Title II, interwoven with prohibitions against liquor traffic, are found many directions to administrative officers intended to prescribe the procedure to be followed. We think that Section 2 was similarly intended to prescribe an administrative course to be followed, and that the provision in Section 29 for punishment of any person who violates any of the provisions of the title was not intended to brand as criminal the failure of administrative officers or United States attorneys to perform any one of the innumerable duties imposed upon them by Title II.

If the statute is properly to be construed, as above indicated, the information in this case failed to state an offense against the United States and the conviction of the plaintiff in error was erroneous. Entertaining this view of the meaning of the statute, we nevertheless deem it advisable to submit the case for the decision of this Court. The point is not so clear as to justify a different course. If

the Court regards the statute as defining the offense charged in the information, it will then be necessary to consider the remaining points relied upon by the plaintiff in error.

## II

### CLAIMED ERRORS RELATING TO THE COURT'S CHARGE

At the close of the testimony the defendant requested the court to give certain instructions to the jury. Instructions Nos. 1 to 4, inclusive, and 7 and 8, thus requested, were refused and an exception noted. (R. 32–34, 45–46.)

Nos. 7 and 8 (R. 14) would have advised the jury that a Federal prohibition agent can not lawfully make an arrest except for an offense committed in his presence, and that a Federal prohibition agent can not lawfully search a vehicle upon a public highway without a search warrant unless such officer has probable cause for belief that the vehicle is carrying contraband or illegal merchandise. These requested instructions had reference to the arrest of Curran and the search of his truck. Curran was not on trial and the defendant, Donnelley, could not complain of an alleged invasion of the constitutional rights of another. *Lampasas* v. *Bell,* 180 U. S. 276, 283–284. Such a charge, while correct as an abstract statement of law, would only have been justified on the theory that if the search and seizure were unlawful, the evidence obtained by it would have been inadmissible and that Donnelley,

therefore, had a right to conclude he had no case against Curran. There is nothing in this record to show that the search was without probable cause, and the requests were properly denied.

By requested Instruction 1 (R. 12) the jury would have been told that reports were required only when the identity of the offender was "known" to the Prohibition Director. This was too broad. Definite knowledge of identity would not be necessary. Besides, there was no question as to the identity of Curran as the truck driver.

Request 2 (R. 12) was as follows:

> That the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an offense has been committed against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense.

This request also related to the identity of the offender. Count 1 of the information in this case charged a failure to report a case against Curran alone. His identity as the driver of the truck was known. The only question was whether Donnelly had evidence of Curran's guilt. The request No. 2, while correct as an abstract statement, was inapplicable to this case.

Request No. 3 (R. 13) asked the court to instruct the jury "that the knowledge upon his part making it obligatory for him to so report consists of suf-

ficent evidence in his possession to reasonably justify prosecution," and that this related both to the fact that an offense had been committed and to the identity of the offender. This request was proper, and we know of no good reason why it or the substance of it was not given.

The request to give this instruction was based upon the provision of the statute, "shall investigate and report violations of this Act to the United States attorney * * * who is hereby charged with the duty of prosecuting the offenders." This language indicates the purpose of Congress that only such violations were to be reported to the United States Attorney as would enable that officer to prosecute the offenders. The United States Attorney is not an evidence-gathering officer, nor has he any supervisory authority over the manner in which the officers charged with administering the Act and of discovering violations of its provisions may perform their duties. He is purely a prosecuting officer, and to report to him an alleged violation without sufficient evidence on which to base a prosecution would give him nothing upon which to act.

Furthermore, the duty imposed by Section 2 is not only to report but to "investigate and report," and if the purpose of the report is to furnish the United States Attorney with grounds upon which to prosecute the offender, it would seem, in the absence of any provision in the statute fixing the

time when such report shall be made, that it is for the investigating officer to determine, in the exercise of good faith, at what point in the investigation the evidence secured by him is sufficient to warrant a prosecution and accordingly to justify his reporting the matter to the United States Attorney.

The court construed the statute as requiring a report to the United States Attorney whenever knowledge of a violation was acquired by the commissioner or any of his subordinates enumerated therein, regardless of the character of the evidence.

The defendant's fourth requested instruction, refused by the court, was to the effect that unless the jury believed beyond a reasonable doubt that Curran was knowingly in possession of and transporting intoxicating liquor, their verdict should be for the defendant on the first count, for it is not a violation of the National Prohibition Act to possess and transport intoxicating liquor without knowing that it is intoxicating liquor.

With reference to whether Curran had committed a violation of the Act, the court in its charge said (R. 38–39):

> It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violated it. * * *
>
> In this case if Curran was transporting whiskey, and he didn't know it was whiskey, the jury might say he didn't intend to violate the law, therefore he can not be convicted,

> nevertheless there was a violation of the law in that he had possession and was transporting intoxicating liquor along a public highway.

Exception was taken by the defendant both to the refusal to charge and to the foregoing charge of the court. (R. 45–46.)

The requested instruction was correctly denied. It was based upon the theory that there could be no failure to perform the duty to report "violations" of the Act, imposed by Section 2, until the officer had evidence beyond a reasonable doubt that the act or omission which he failed to report did constitute such a violation. Surely such reports are not to be withheld by the Director until he has obtained evidence of guilt beyond a reasonable doubt.

The charge actually given by the court was, in effect, that the jury might find that there had been a violation which the defendant was required to report, notwithstanding that they might determine that such violation had not been committed by Curran. But, as shown by the information, the charge upon which the defendant was tried was not merely that he had failed to report a violation, but that he had failed to report a violation *committed by Curran* at a specified time and place. As these allegations were undoubtedly essential to apprise the defendant of the accusation against him, the instruction that the jury might convict, although find-

ing that Curran had not committed the violation alleged, appears to have been erroneous.

The final exception taken by plaintiff in error to the court's charge was to that part of it dealing with the effect of Section 33, Title II, of the National Prohibition Act, which declares that the possession of intoxicating liquor by anyone not permitted under Title II to possess it shall be prima facie evidence that such possession was for an unlawful purpose and that "the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used." Referring to this statute, the court said (R. 38):

> So if one is in the possession of intoxicating liquor—and one who is transporting liquor must necessarily be in possession of it—the presumption is that the possession is illegal, that it is for the purpose of violating the law, and the burden is on him to show the contrary.

This had relation to whether Donnelley had reason to believe the evidence in his possession showed a violation of the Act by Curran. In deciding whether Donnelley had failed to report a case where he had sufficient evidence to warrant prosecution the jury could properly consider that the mere possession of liquor by Curran created a statutory presumption of guilt, and thus strengthened the case against him. This charge was proper.

## III

### THE SUFFICIENCY OF THE EVIDENCE

Plaintiff in error complains that the evidence in this case is wholly insufficient to sustain the verdict. In support of that contention he has set out in his brief a résumé of the testimony introduced by the Government as well as by the defendant, in the apparent belief that it is a proper function of an appellate court to weigh conflicting testimony and determine therefrom whether the jury were justified in finding the defendant guilty beyond a reasonable doubt. But the rule is well established that in a criminal case the question whether the verdict was contrary to the evidence can not be considered on writ of error if there was any proper evidence to go to the jury. *Crumpton* v. *United States,* 138 U. S. 361, 363; *Burton* v. *United States,* 202 U. S. 344, 374.

The Government's evidence showed that Curran was found in possession of a quantity of beer containing more than one-half of one per cent alcohol by volume; that this was brought to the attention of the defendant, as Federal Prohibition Director, and that, although in possession of such knowledge, the defendant failed to report the matter to the United States Attorney. The possession by Curran raised a presumption of guilt against him. There was evidence from which the jury could find that Donnelley had failed to report for prosecution

a case against Curran, in which the available evidence justified a prosecution of Curran.

Respectfully submitted.

WILLIAM D. MITCHELL,
*Solicitor General.*

MABEL WALKER WILLEBRANDT,
*Assistant Attorney General.*

JOHN J. BYRNE,
*Attorney.*

NOVEMBER, 1927.

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# SUPREME COURT OF THE UNITED STATES.

No. 110.—October Term, 1927.

John P. Donnelley, vs. The United States of America. } Certificate from the United States Circuit Court of Appeals for the Ninth Circuit. Entire record sent up under § 239, Judicial Code.

[April 9, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

Defendant was the Prohibition Director for Nevada. An information filed in the United States court for that district charged that he, having knowledge of the unlawful possession and transportation of intoxicating liquor by one Curran, did wilfully and unlawfully fail to report such violations to the United States Attorney. The jury found him guilty and the court imposed a fine of $500. Alleging various grounds for reversal, he took the case to the Circuit Court of Appeals. That court, acting under § 239 of the Judicial Code, certified to this Court a question concerning which it desired instruction. Defendant submitted the question upon a brief. Later we required the entire record to be sent up, and so brought the case here for decision. The United States filed additional briefs. Oral arguments were made for the respective parties. But defendant failed to submit any other brief or to file any statement of points or specification of errors intended to be urged here. Rule 25, Par. 2(e), Par. 4. And see Rule 11, Par. 9. We confine our consideration to the question argued in his brief. *Southeastern Express Co.* v. *Robertson*, 264 U. S. 541. *Home Benefit Association* v. *Sargent*, 142 U. S. 691, 694-695. The substance of the contention is that intentional failure of a prohibition director or other enforcement officer, having knowledge of crimes and offenders against the Act, to report them to the United States Attorney is not a punishable offense.

Section 2, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 308; U. S. C., Tit. 27, § 11), provides: "The Com-

missioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States Attorney for the district in which committed, . . ." The Act does not specifically fix punishment for a violation of that provision. But § 29 provides that: "Any person . . who . . violates any of the provisions . . for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500 . . ."

As there are no common law crimes against the Government (*United States* v. *Eaton,* 144 U. S. 677), each case involves the construction of a statute to determine whether the acts or omissions of the accused are denounced as punishable. And regard is always to be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an Act of Congress. *United States* v. *Lacher,* 134 U. S. 624, 628. *Todd* v. *United States,* 158 U. S. 278, 282. *Fasulo* v. *United States,* 272 U. S. 620, 629. The evidence showed, and the verdict, when read in the light of the court's charge, means that the jury found that Curran was discovered transporting ten barrels of intoxicating liquor and that plaintiff in error, with actual knowledge of that violation, intentionally failed to report the crime and offender for prosecution. Plainly that was a violation of duty imposed on him by § 2. And § 29 declares that violators of any provision shall be punished. Taken according to their ordinary meaning, the words used are sufficient to make the facts alleged and found a punishable offense. The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment. *United States* v. *Hartwell,* 6 Wall. 385, 395. *United States* v. *Wiltberger,* 5 Wheat. 76, 95. Section 3 forbids a narrow or strict construction of the Act, and directs that all its provisions "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Diligence and good faith on the part of enforcement officers are essential. The great difficulties always attendant upon efforts to suppress the liquor traffic have been noticed and cited in a number of decisions of this Court. *Crane* v. *Campbell,* 245 U. S. 304, 307. *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 282, 297. *Everard's Brew-*

*eries* v. *Day*, 265 U. S. 545, 560. *Lambert* v. *Yellowley*, 272 U. S. 581, 595. The failure to enforce laws of the States passed to regulate or prohibit the sale of intoxicating liquor was one of the principal reasons for the adoption of the Eighteenth Amendment. Violations of such enactments were open and notorious. Connivance and cooperation between officers and offenders frequently existed. Those who drafted and passed the enforcement Act knew that national prohibition would be assailed by influences more powerful than those that had embarrassed earlier and less sweeping state laws. Experience had shown that it would not do to leave prohibition enforcement officers free to determine what cases should be prosecuted and what ignored, and that mere imposition of duty to report offenders would not be enough. The infliction of punishment for their intentional violations is an appropriate measure to hold them to the performance of their duties.

The Act is comprehensive and discloses a legislative purpose fully to enforce the prohibition declared by the Eighteenth Amendment. *National Prohibition Cases*, 253 U. S. 350. *Corneli* v. *Moore*, 257 U. S. 491. *Vigliotti* v. *Pennsylvania*, 258 U. S. 403. *Grogan* v. *Walker & Sons*, 259 U. S. 80. *Everard's Breweries* v. *Day*, *supra*. *Lambert* v. *Yellowley*, *supra*. The forfeitures, fines and imprisonments unquestionably provided for show an intention to compel obedience. Congress was not content to impose duties and merely direct their performance; it diligently provided means for enforcement. An abridged reference to the things denounced as unlawful or expressly forbidden and those by the Act commanded to be done will be sufficient to indicate how thoroughly Congress intended to enforce this Article. The Act prohibits beverages having as much as one-half of one per cent of alcohol by volume (§ 1). It declares that no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess such liquor except as authorized by the Act. (§ 3.) Denatured alcohol, medicinal, toilet and other preparations unfit for beverage purposes are not forbidden, if they correspond with the descriptions and limitations specified. Purchase and possession of liquor to make such articles are allowed, but manufacturers are required to procure permits, give bonds, keep records and make reports. (§ 4.) No person is allowed without a permit to manufacture, sell, purchase, transport or prescribe liquor, but one may purchase and use it for medicinal purposes when prescribed by a physician. (§ 6.) No one but a

physician holding a permit may issue a prescription for liquor. And no physician is allowed to prescribe it unless, upon an examination or the best information obtainable, he believes its use as a medicine is necessary and will afford relief from some known ailment. No more than a pint of spirituous liquor shall be prescribed for the same person within ten days, and no prescription shall be filled more than once. Every physician is required to keep a record showing the date of every prescription, the amount prescribed, to whom issued, the purpose or ailment for which it is to be used, the amount and frequency of the dose. No physician may prescribe liquor and no pharmacist may fill any such prescription except on blanks furnished by the commissioner, and pharmacists are required to keep records of prescriptions filled. (§§ 7 and 8.) No person is allowed to manufacture, purchase for sale, sell or transport liquor without making a permanent record showing prescribed details. (§ 10.) Copies of permits to purchase must be preserved by the seller. (§ 11.) Manufacturers are required to attach labels showing details concerning liquor made and sold by them. (§ 12.) It is unlawful for any person to procure the transportation of liquor without giving the carrier notice of the character of the shipment. No carrier is permitted to transport and no person may receive liquor from a carrier unless there is shown upon the package specified information as to consignor and consignee, and also the number of the permit allowing the transportation. (§ 14.) It is unlawful for any consignee to receive or any carrier to deliver any liquor in a container on which appears any statement known to be false. (§ 15.) It is unlawful to advertise liquor or to permit a sign advertising it to remain on one's premises, (§ 17) or to advertise or to possess for sale any utensil, substance or recipe intended for use in its unlawful manufacture, (§ 18) or to give any information as to how liquor may be obtained in violation of law. (§ 19.) Every place where liquor is made, kept or sold in violation of the law is declared to be a nuisance, and the person who maintains it is liable to specified punishment. (§ 21.) It is declared that any violation on leased premises by the lessee or occupant shall work a forfeiture of the lease at the option of the lessor. (§ 23.) When an officer shall discover one transporting liquor in any vehicle in violation of law it is his duty to seize the liquors, take possession of the vehicle, arrest and proceed against the person in charge of it. (§ 26.)

A conservative analysis of the provisions of the Title is contained in one of the briefs filed by the Government. It shows eight provisions declaring specified things to be unlawful, eighteen prohibiting others and fifteen commanding the performance of various obligations imposed. Except for nuisance (§§ 21-23. Cf. §§ 24, 25), all punishments to be imposed on offenders are prescribed by § 29. Its substance follows. "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined . . or imprisoned . ." Second and subsequent offenses are more severely to be punished. "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for the first offense not more than $500"; and heavier penalties are prescribed for second and subsequent offenses. Obviously Congress intended to provide for the punishment of the things declared to be unlawful and those specifically prohibited. And it is plain that there was no failure to provide measures for the enforcement of its commands. Undoubtedly the general clause of this section covers unauthorized transportation, importation, exportation, delivery, possession and the advertising or possession for sale of anything intended for use in its unlawful manufacture. The clause is broad enough—and it is the only one—to make punishable violations of the provisions governing manufacturers, pharmacists, shippers and carriers. Undoubtedly Congress intended to penalize their violation of the duties imposed on them. And, unless it is to be restricted by implication in favor of enforcement officers, the general language used also covers violations of the provisions enacted to govern their official conduct.

But there is no support for a construction so restrained. It always has been deemed necessary to enact laws to compel performance of duty and to prevent corruption on the part of public officers. They are not attended by any special presumption that general language in disciplinary measures does not extend to them. Neglect of official duty is a misdemeanor at common law. Russell Crimes and Misdemeanors (7th Ed.), p. 601. *People* v. *Herlihy*, 72 N. Y. S. 389, and cases cited. Intentional failure of enforcement officers to report violations is doubly injurious to the public. It encourages offenders and disgraces the law. Performance of duty by prohibition agents is quite as important as compliance with

law by authorized manufacturers, physicians, pharmacists and carriers. The general clause in question applies to the latter. With equal reason it may be held to cover failures of enforcement officers to report for prosecution violations and offenders known to them. And that construction is consistent with the established policy of Congress. Similar neglect of duty has long been punishable. The Act of July 18, 1866,[1] imposes penalties upon collectors of customs and other officers for failure to make required reports. An Act of July 20, 1868,[2] provides that any revenue officer or agent who, having knowledge or information of the violation of the revenue laws, fails to report the same to his superior officer and the Commissioner of Internal Revenue shall be punished by fine and imprisonment. The duties of prohibition officers and revenue officers overlap. They are in the same department and directed by the same head. They are under like duty to report. Cf. R. S. § 3164, as amended; U. S. C., Tit. 26, § 26. Treasury regulations require that the reports of prohibition agents shall include statements of infringements of internal revenue laws also involved. Regulations 12, Art. 35. They are entitled to like protection against prosecution in state courts for acts done under color of their office. *Maryland* v. *Soper* (No. 1), 270 U. S. 19. And the policy of Congress is further shown by the Prohibition Act for the District of Columbia, which makes it an offense for any officer to fail to report violations to the corporation counsel.[3] These and other Acts[4] prescribing punishment for neglect of official duty strongly support the contention that Congress intended to make prohibition officers punishable for failure to make the reports required by § 2.

Defendant argues that, if the failure of enforcement officers to report violations be held punishable "they cannot . . . determine what classes or character of violators it is most advan-

[1] § 42, c. 201, 14 Stat. 178, 188; R. S. § 1780; as amended by Act of March 4, 1909, § 101, c. 321, 35 Stat. 1088, 1106; U. S. C., Tit. 18, § 188.

[2] § 98, c. 186, 15 Stat. 125, 165; R. S. § 3169; U. S. C., Tit. 26, § 64. And see Act of February 8, 1875, § 23, c. 36, 18 Stat. 307, 312; U. S. C., Tit. 26, § 68.

[3] Act of March 3, 1917, § 21, c. 165, 39 Stat. 1123, 1129.

[4] Neglect of duty by employee in the census. § 22, c. 2, 36 Stat. 1, 8, reenacted as § 22, c. 97, 40 Stat. 1291, 1299; U. S. C., Tit. 13, § 44. Neglect of duty imposed by Alaska Game Commission Act, § 15, c. 75, 43 Stat. 739, 747; U. S. C., Tit. 48, § 202. Failure of guide to report violation of Alaska Game Law, § 5, c. 162, 35 Stat. 102, 104; U. S. C., Tit. 48, § 202.

tageous, for the purpose of real enforcement, to investigate and report." But there is nothing to indicate that any such determinations are to be made. Congress intended that prohibition officers should not intentionally fail to report violations and that the law should be enforced against all offenders. The general clause covers all violations except the relatively few specifically dealt with. And it reasonably may be held to apply to violations of official duties and to safeguard against connivance between officers and offenders. He also argues that the imposition of heavier penalties for second and subsequent offenses shows that the clause was not intended to apply to offending officers because, as it was said, they would not be in office after conviction. But that suggestion has little if any weight when it it is remembered that the clause is aimed at so many violations and non-office-holding offenders. There is no rule requiring every part of the provision to apply to all classes covered by it. Cf. *United States* v. *Union Supply Company*, 215 U. S. 50, 55. Moreover, it is not impossible that an enforcement officer may be in office subsequent to a conviction for such an offense.

The construction contended for by defendant unduly restrains the language of the clause in question, is inconsistent with the context and contrary to the purposes of the Act and the policy of Congress. It is without substantial support and cannot be sustained.

*Judgment affirmed.*

Mr. Justice SUTHERLAND and Mr. Justice SANFORD dissent.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*